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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

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JUDGES OF THE SUPREME COURT

OF THE

STATE OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

ORSAMUS COLE,	CHIEF JUSTICE.
WILLIAM P. LYON,	ASSOCIATE JUSTICES.
DAVID TAYLOR,	
HARLOW S. ORTON,	
JOHN B. CASSODAY,	

Attorney General,	CHARLES E. ESTABROOK.
Clerk, - - -	CLARENCE KELLOGG.

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ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 76.

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CASES DETERMINED

AT THE

January Term, 1890.

KITTNER, Appellant, vs. THE MILWAUKEE & NORTHERN RAILROAD COMPANY, Respondent.

April 29 — May 20, 1890.

New trial: Verdict contrary to weight of evidence: Discretion.

In a case where the evidence was such that opposite conclusions might reasonably be drawn from it by different persons, the granting of a new trial, on the usual terms, upon the ground that the verdict was against the weight of evidence, is *held* not to have been an abuse of discretion.

APPEAL from the Circuit Court for *Brown* County.

Appeal from an order granting a new trial. The action is to recover damages for personal injuries sustained by the plaintiff, alleged to have been caused by the negligence of the defendant railroad company. The plaintiff was a brakeman employed by that company, and when in the performance of his duty as such, on the top of a train of cars approaching the city of De Pere from the north, in the day-time, he was struck by a tramway erected across the railroad, and received the injuries complained of. He was upon a refrigerator car, not belonging to the company, which was about two feet higher than the cars of the company in the same train. The tramway was sufficiently high to enable him, when standing on the cars of the company,

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to pass safely under it, but not sufficiently high to enable him to do so when standing erect on top of the refrigerator car. The plaintiff had made several trips over the same railroad in the day-time, as brakeman, before he was injured, passing under the tramway safely when standing on the lower cars. On several of these trips the train contained refrigerator and other foreign cars of the height of the one on which he was standing when injured. The location and nature of his wounds tended to show that when so injured the plaintiff was in a stooping position. It was the constant custom of the company to haul foreign refrigerator and other cars of the same height in its trains, of which the plaintiff had knowledge. There was much other testimony bearing on the questions of negligence, but it is unnecessary to state it here.

The jury found specially (1) that the tramway was dangerous because too low; (2) that the railroad company was guilty of negligence in allowing it to remain in the condition it was when plaintiff was injured; (3) that the plaintiff, at and before the time he was injured, did not know or have the means of knowing of the existence of the tramway in question, and its height in relation to cars of different heights passing under it; and (4) that he was not guilty of any want of ordinary care which contributed to his injury. The jury also assessed plaintiff's damages at $2,500. The court disapproved of the third finding, which relates to the plaintiff's knowledge and means of knowledge of the existence, height, etc., of the tramway, and on motion of the defendant set aside the verdict and granted a new trial on condition that the defendant pay the taxable costs of the term.

For the appellant there were briefs by *Raymond & Brennan*, and oral argument by *John H. Brennan.*

For the respondent there was a brief by *Alfred H. Bright*, attorney, and *Charles E. Vroman*, of counsel, and oral argument by *Mr. Bright.*

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LYON, J. There is little to be said in determining this appeal. Without the third finding, which the circuit court disapproved, the special verdict will not support a judgment for plaintiff. The testimony relating to the subject matter of that finding is conflicting, or at least is such that opposite conclusions may reasonably be drawn from it by different persons of equal and average capacity to judge of the weight of evidence. The jury came to one conclusion, and the learned judge of the circuit court reached the opposite conclusion. The reasons of the judge, upon which his conclusion is based, were stated by him in an able and discriminating written opinion on file in the case. We are not concerned to inquire which view of the testimony is the correct one. The judge recognized the fact that there was testimony to go to the jury on the question of the plaintiff's knowledge and means of knowledge of the existence, height, etc., of the tramway, and submitted the same to the jury. He again recognized the same fact by imposing terms on the defendant as the condition of granting a new trial, and expressly rested the order for a new trial on the proposition that the weight or preponderance of testimony was against the verdict.

So we have a case in which the trial court, being dissatisfied with the verdict on a material and controverted proposition of fact, because it thought the same was against the weight of evidence, in the exercise of its discretion set the verdict aside and granted a new trial upon the usual terms. In this we perceive no abuse of discretion, and hence cannot overrule the action of that court.

This is not a case in which the court has proceeded upon a mistaken view of the law, as in *Bushnell v. Scott*, 21 Wis. 457; *Jones v. Evans*, 28 Wis. 168; and *Duffy v. C. & N. W. R. Co.* 34 Wis. 188,— but upon the opinion that, as to a material fact, the verdict is against the weight of evidence. This is a legitimate ground for the exercise of its discretion

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by the circuit court. *Smith v. Lander*, 48 Wis. 587, and cases cited.

The circuit court did not pass upon the question of the alleged excessiveness of damages, and it will not be determined on this appeal.

By the Court.—The order granting a new trial is affirmed.

HORSCH, Respondent, vs. THE DWELLING HOUSE INSURANCE COMPANY, Appellant.

April 29 — May 20, 1890.

Insurance against fire: Insurable interest.

A married man purchased a farm and buildings, paying therefor with his own money. By his direction the deed was made to his wife, there being an understanding between them that she would convey to him on request. He made improvements, and had possession and the entire beneficial use of the farm and buildings, cultivating the farm at his own expense, and using the proceeds in the support of his family. All the personal property on the farm belonged to him. *Held*, that he had an insurable interest in the buildings.

APPEAL from the Circuit Court for *Brown* County.

The facts are stated in the opinion.

For the appellant there was a brief by *Vroman & Sale*, and oral argument by *Charles E. Vroman*. They contended, *inter alia*, that the marriage relation alone did not give the plaintiff an insurable interest in his wife's property. *Clark v. Dwelling House Ins. Co.* 81 Me. 373; *Traders' Ins. Co. v. Newman*, 120 Ind. 554; *Agricultural Ins. Co. v. Montague*, 38 Mich. 551. An interest in property to be insurable must be definite, fixed, and specific, the loss of which will be a direct pecuniary loss to its owner. It must

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be a *legal* or *equitable* interest, or such an interest as the courts will recognize and protect in any proper judicial proceeding where it becomes involved. *Grevemeyer v. Southern M. F. Ins. Co.* 62 Pa. St. 340; *Bayles v. Hillsborough Ins. Co.* 27 N. J. Law, 163; *Howard v. Albany Ins. Co.* 3 Denio, 303; *Baldwin v. State Ins. Co.* 60 Iowa, 497; *Murdock v. Chenango Co. M. Ins. Co.* 2 N. Y. 210; *Warren v. Davenport F. Ins. Co.* 31 Iowa, 466.

For the respondent there was a brief by *Hudd, Wigman & Martin*, and oral argument by *J. H. M. Wigman.*

TAYLOR, J. This is an action to recover damages upon a fire insurance policy. The policy insured the plaintiff against loss by fire upon a dwelling-house, several barns, household furniture, wearing apparel, farming implements, grain, and hay. The policy was issued June 4, 1888, and a fire occurred August 30, 1888, destroying most of the property insured. On the trial in the circuit court the plaintiff recovered $140 for the loss of personal property insured, and $725 for the loss on the insured buildings. The defendant only appeals from that part of the judgment which gave the plaintiff $725 for loss on the insured buildings.

The only ground stated by the appellant for reversing the judgment as to the part appealed from is that it claims the plaintiff had no insurable interest in the buildings destroyed, either at the time the policy was issued or at the time of the loss.

The evidence on the trial shows that, some years before the policy of insurance was issued to the plaintiff, he bought the land on which the insured buildings were located from one Charles Rogers, and paid for it with his own money, and by his direction Rogers conveyed the land to his wife. The house was on the land at the time he purchased it. Plaintiff built the barns himself, made all the other improvements on the farm at his own expense, took actual posses-

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sion thereof with his family, and cultivated the land at his own expense and on his own account, and had the entire and sole management of the farm. The proceeds of the farm were used to support the family. This was done with the consent of the wife. There was an understanding between the plaintiff and his wife that she would deed the farm to him at his request. All the stock, farm implements, household furniture, and other personal property on the farm were the property of the plaintiff. This was the situation of affairs when the policy was issued and when the fire occurred. It was also proved that at the time the policy was issued and delivered to the plaintiff the agent who issued the same was informed that the title to the land was in the wife.

Upon this state of facts, we think it is very clear that the plaintiff had an insurable interest in the house and barns at the time the policy was issued, as well as at the time of the fire. The actual possession and beneficial use of the farm were in the plaintiff, with the full consent of the wife, at the time the policy was issued as well as at the time of the loss. There can be no doubt, therefore, that the plaintiff had a pecuniary and valuable interest in the property insured and destroyed, and therefore an insurable interest. The possession and use of the house and barns was of the utmost importance to him in providing a support for himself and family, and their destruction was substantially as disastrous to him in his endeavors to support himself and family as though he had the actual title. He had in fact the possession and the entire beneficial use, of which he was deprived by their destruction. The actual possession and use of property is a valuable right, and it is especially valuable when held with the permission of the real owner. It has even been held that a disseisor who is in peaceable possession after having ousted the real owner, has an insurable interest without regard to the question of actual ownership,

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especially when the disseisor has acted in good faith, believing he had the right to such possession. See cases hereafter cited.

It seems very clear to us that a person in the actual possession and use of real property for his personal benefit, with the assent of the real owner, stands in a much better position, and has a pecuniary interest much more valuable, than a mere disseisor in possession holding adversely to the real owner. What constitutes an insurable interest, so as to take the case out of the law prohibiting wager policies, is not very clearly defined, and it is difficult to lay down any general rule applicable to all cases. Flanders, in his work on Insurance, says: "But an 'insurable interest' does not rigorously mean that the assured must have an absolute right of property in the thing insured. If he has a special, limited interest, or if he would suffer any disadvantage by the destruction of the premises, or any reasonable expectation of profit would be thereby defeated, he may protect or indemnify himself by insurance. . . . In a word, if the party insured has any interest that would be injured in the event that the peril insured against should happen, the courts will maintain his policy." Fland. Ins. 377. Wood, in his work on Insurance, says: "It is not necessary that the assured should have either a legal or equitable interest, or indeed any property interest, in the subject matter insured. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him or those for whom he acts." 1 Wood, Ins. § 281, p. 645. May, in his work on Insurance, says: "An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists when there is not any present property. . . . Yet such a connection must be established between the subject matter insured, and the party in whose behalf the insurance has been effected, as may be sufficient for the purpose of deducing

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the existence of a loss to him from the occurrence of an injury to it." Again he says: "When a man is so circumstanced with respect to matters exposed to risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing." Parts of secs. 76, 77. These statements of what is an insurable interest have been considered, discussed, and approved in such an almost endless number of cases that we shall content ourselves with citing a few of them, which were cases based upon facts analogous to the facts in the case at bar: *Redfield v. Holland P. Ins. Co.* 56 N. Y. 354; *Farmers' L. & T. Co. v. Harmony F. & M. Ins Co.* 51 Barb. 33; *Strong v. Manufacturers' Ins. Co.* 10 Pick. 40; *Putnam v. Mercantile M. Ins. Co.* 5 Met. 386; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; *Eastern R. Co. v. Relief Fire Ins. Co.* 98 Mass. 420; *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543; *Harris v. York M. Ins. Co.* 50 Pa. St. 341; *Merritt v. Farmers' Ins. Co.* 42 Iowa, 11; *American C. Ins. Co. v. McLanathan*, 11 Kan. 533; *Goulstone v. Royal Ins. Co.* 1 Fost. & F. 276; *Williams v. Roger Williams Ins. Co.* 107 Mass. 377–379; *Cohn v. Virginia F. & M. Ins. Co.* 3 Hughes (U. S.), 272; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 54; *Travis v. Continental Ins. Co.* 32 Mo. App. 198, 206; *Amsinck v. American Ins. Co.* 129 Mass. 185, 186.

The cases above cited are quite sufficient to show that the objection taken by the learned counsel for the appellant, that the evidence in the case at bar does not show that the plaintiff had an insurable interest in the house and barns is wholly unsupported by principle or authority.

Whether the insurance might be held valid on the ground that the insurer had full knowledge of the state of the title when the policy was issued, and he must therefore be held to have intended to insure the property in the name of the plaintiff for the benefit of the real owner, and that plaintiff

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may be considered as having insured as the agent of his wife and for her benefit as well as for his own, need not be decided in this case. Upon this point see *Harris v. York M. Ins. Co.* 50 Pa. St. 341, and *American C. Ins. Co. v. McLanathan*, 11 Kan. 533.

The judgment of the circuit court was clearly right.

By the Court.— That part of the judgment appealed from is affirmed.

BLAZINSKI, Appellant, vs. PERKINS, Respondent.

April 29 – May 20, 1890.

Master and servant: Personal injuries: Defective appliances: Evidence: Instructions to jury: Negligence of co-employee.

1. In an action for personal injuries caused by the fall of a scaffold upon which plaintiff was at work, and which was alleged to have been defectively constructed, it was not error to permit the jury to take to their room a model of the scaffold which had been used by the defendant's witnesses to illustrate how it was built, although such model had not been formally introduced in evidence, and the testimony as to its correctness was conflicting.
2. The plaintiff having told the carpenters who built the scaffold not to put a brace in the middle of it, as they were about to do, because it would be in his way and he would have to take it out, and that the scaffold was all right without it, an instruction that "*a mere suggestion* of the plaintiff that he thought the middle brace was not needed, would not excuse the defendant for not putting the same in its place, if it was necessary to make the scaffold safe," was not applicable to the facts and was properly refused.
3. Evidence of what the plaintiff told a witness through an interpreter should not be excluded as hearsay.
4. Brick-masons and their attendants, in the employ of the same person and engaged in the same work upon the same scaffold, are co-employees, and the employer is not liable for an injury to one through the negligence of another.

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APPEAL from the Circuit Court for *Marinette* County.

Action to recover damages for personal injuries caused by the fall of a scaffold alleged to have been defectively constructed. The facts will sufficiently appear from the opinion. The plaintiff appeals from a judgment in favor of the defendant.

For the appellant there was a brief by *Hudd & Wigman*, and oral argument by *J. H. M. Wigman*. They contended, *inter alia*, that the instructions to the jury were in opposition to the rule adopted by this court, that when the injury is traceable to the primary negligence of the defendant, the plaintiff's right of recovery cannot be defeated by showing contributory negligence on the part of a co-employee for whose acts the plaintiff is not responsible. *Stetler v. C. & N. W. R. Co.* 46 Wis. 497; *S. C.* 49 id. 609; *Atkinson v. Goodrich Transp. Co.* 60 id. 141; Wood on M. & S. 821, 825; *Mathews v. McDonald*, 3 Sess. Cas. (3rd series), 506; *Flike v. B. & A. R. Co.* 53 N. Y. 555; *Rose v. B. & A. R. Co.* 58 id. 219; Wharton on Neg. 234.

For the respondent there was a brief by *Fairchild & Fairchild*, and oral argument by *H. O. Fairchild*.

ORTON, J. The defendant was building a brick block, and employed the plaintiff and other brick-masons to lay the brick, and certain carpenters to do the wood-work. It became necessary to build a scaffold on which the plaintiff and another mason could stand to lay brick, and two of the carpenters, under a foreman, built the scaffold in some haste, as the masons were waiting for it. The plaintiff stood by and saw the work on the scaffold done, or at least the finishing part of it. There was testimony that the carpenters had prepared a brace to be placed in the middle of it, and which they thought was necessary to make the scaffold safe, and were about to put it in, when the plaintiff told them not to do so, as it would be in his way, and if they put it in

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he should have to take it out, and that the scaffold was all right without it. There was also testimony that a fellow-workman, on the scaffold with the plaintiff, knocked off with a hammer a stay-brace at some other part of the scaffold, and that these defects caused the scaffold to fall, and that it fell soon after the said stay was removed. There was some evidence tending to show that the scaffold was overloaded with brick. After working on this platform three or four hours, it fell and carried with it the plaintiff, his fellow-workman, and an attendant, and injured the plaintiff very seriously.

The jury found a verdict for the defendant. On this appeal from the judgment the learned counsel of the appellant assigns several errors of law, which will be disposed of in their order.

1. It seems that the foreman of the carpenters who put up the scaffold made a model of it, and such model was used by the witnesses of the defendant to illustrate to the jury how it was constructed. There was testimony that it was a correct model of the scaffold, but this was disputed by the plaintiff. It was not formally introduced in evidence, but the jury were allowed to take it to their room. This is assigned as error. The model became a necessary part of the witnesses' testimony, to go to the jury as such. It was not used as independent testimony of the real construction of the scaffold, but only to explain the testimony of the witnesses. This court very recently decided that an unrecorded plat of lots might be used in the same way, and might be formally introduced in evidence, and used by counsel on the argument. *Meinzer v. Racine*, 74 Wis. 166. The model so used and taken by the jury was only to show what the witness testified to, and would not corroborate the testimony in the least. It would be like a pencil drawing made by a witness on the stand, in the presence of the jury, to illustrate or explain his oral evidence. The use of the

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model in this way seems to have been proper. See the authorities cited in the above case.

2. The witness Horde, the foreman, testified that when they were about to put in that brace the plaintiff said: "*No use putting in that, because, if he put it in, they would take it out; no need of it; was in their way.*" The witness added: "My men told me he [plaintiff] said so." The plaintiff's counsel moved that the above testimony of the witness be stricken out as hearsay, and the court denied the motion. This testimony was explained as follows: The witness Horde did not understand English, and, when the plaintiff said this to them,— that is, to the witness and two other persons who were making the scaffold,— he asked one of the others what he said, and he translated it to him as above, in the presence of the plaintiff. It follows, then, that the plaintiff said this to Horde through an interpreter. When so translated, the plaintiff tacitly assented to its correctness. It was no more hearsay than any evidence given through an interpreter.

3. The court instructed the jury, in effect, that if any of those working on the scaffold with the plaintiff, negligently overloaded the scaffold with brick, which caused it to fall, it would be the negligence of a fellow-employee, for which the plaintiff could not recover of the defendant. This is claimed to be erroneous, and the learned counsel of the appellant cites authorities which show that the fact that some one else besides the defendant contributed to produce the injury would not be a defense. But in all such cases the person who thus contributes is a stranger, not connected with the plaintiff as a fellow-servant or co-employee, as in *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141. The persons working on the scaffold were the plaintiff, another brickmason, a carrier of brick, and a carrier of mortar, engaged in the same work and employed by the same person. There can be no question but that they were co-employees, and, if the plaintiff was injured through their negligence, the de-

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fendant is not responsible to the plaintiff for it. This has been too often decided by this court to require authorities. The court stated hypothetically the facts which would make them co-employees, and then stated the law applicable to such facts correctly.

4. The court, in instructing the jury, said: "The testimony tended to show that there were two hundred bricks or upwards on the scaffold." This was not erroneous, as claimed by the counsel. There was testimony that there were from 200 to 250 bricks on the scaffold when it fell, and that such a number was not necessary.

5. The learned counsel asked the court to instruct the jury that "*a mere suggestion* of the plaintiff that he thought the middle brace was not needed would not excuse the defendant for not putting the same in its place, if it was necessary to make the scaffold safe." This instruction was refused, and very properly, for it was not applicable to the case made by the evidence. The plaintiff did not make a *mere suggestion* that it was not needed, but he told the carpenters not to put it in, and that if they did he would take it out, and that it would be in his way, etc.

There are some other exceptions to the instructions on the ground that the court misstated the evidence to the jury. The court in every instance stated only that the defendant claimed the evidence to be so, or that it tended to prove certain facts, or if they should so find,—the common form of instructions. They do not seem to be liable to the criticisms made on them. The verdict seems to be sustained by the evidence, and it does not appear that the court committed any errors of law on the trial.

By the Court.—The judgment of the circuit court is affirmed.

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SHERMAN, Respondent, vs. THE MENOMINEE RIVER LUMBER COMPANY, Appellant.

April 30 — May 20, 1890.

Master and servant: Injuries from defective machinery: Special verdict: Court and jury.

1. In an action for personal injuries alleged to have been caused by defects in an edger through which the plaintiff was engaged in running lumber, the jury found that the edger was out of repair, but to the question, "Was the want of repair of the edger a cracked or broken roller or rollers, or rollers that were worn out of proper form by use?" they merely answered "Yes." The complaint alleged that one of the rollers was cracked and broken, but did not allege that they were worn out of proper form by use, and there was no evidence that such was the case. *Held*, that such indefinite and uncertain answer could not aid in supporting the judgment.
2. To the question whether the defendant's agents knew that the edger was liable on occasions to throw back with great force planks and boards that were passing through it, the jury answered that there was no proof upon which they could base an answer to that question. *Held*, that this was equivalent to a negative answer and should have been received as such, and that it was error to send the jury back, after causing to be read to them portions of the testimony of one witness, but omitting other material portions and other testimony on the same subject.
3. In the absence of evidence as to whether the defendant's agents knew of plaintiff's inexperience and ignorance of the dangers connected with the machinery, the jury cannot be permitted, in deciding the question, to rely upon mere inference, conjecture, and their own personal experience.
4. A question as to whether, if the plaintiff had known that under certain circumstances boards were likely to be thrown back from the edger, he could have avoided the injury, being based entirely upon a hypothetical state of facts which the plaintiff insists did not exist, should not have been submitted to the jury.
5. A special verdict which does not determine all the material and controverted facts in issue, is defective, and if it is unaccompanied by a general verdict, such defect is not waived by a failure to object to the questions submitted or to request the submission of others.

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APPEAL from the Circuit Court for *Marinette* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action is brought to recover damages by reason of personal injury sustained by the plaintiff, October 9, 1883, while in the employ of the defendant, in its saw-mill in Marinette, and while engaged in handing boards to another servant of the defendant, who was then engaged in feeding the edger in said saw-mill, by being suddenly struck by a board on his right thigh with such force as to crush and break the same, and make it necessary to amputate his right leg, which was done on that day.

The complaint alleges two causes of action, and the first is to the effect that the defendant and its managing agents negligently provided and used an unsafe, defective, and insecure edger, and which defect consisted, among other things, in not being properly set up and held together,—that is to say, that the roller above the board, and which propelled the board against the saw, was so carelessly and negligently attached that it often became raised or thrown up by a small piece of bark or splinter coming from the board, so as to loosen its hold thereon and allow it to be thrown back when it struck the saw; that the lower roller was cracked and broken so that a heavy board would bend it down, and thus allow the board to be thrown back violently when struck by the saw. The second cause of action, as therein alleged, is to the effect that the defendant, well knowing of the plaintiff's youth and inexperience in all matters relating to saw-mills and the dangers therewith connected, negligently and carelessly set him at said work, which at all times and under all circumstances was extra hazardous and dangerous, without notifying or cautioning him of such danger, or showing him how to avoid the same.

The answer admits the corporate existence of the defend-

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ant, such employment, and the receiving of the injury, but otherwise denies each and every allegation in the complaint.

At the close of the trial, the jury, under the charge of the court, returned a special verdict to the effect (1) that at the time and place complained of the plaintiff was at work for the defendant in the saw-mill, with another person in the employ of the defendant, running lumber through an edger machine propelled by steam-power,—such other person being in charge of, and feeding lumber to, the machine, and the plaintiff passing lumber to the feeder of the machine; (2) that at said time a board or plank that the feeder was passing through the edger was thrown back by the edger against the plaintiff, thereby causing the injury complained of; (3) that at the same time said edger was out of repair, so that it did not do its work properly and safely. The fourth question and answer were as follows: "If you answer 'No' to the last question, this question need not be answered, but, if you answer 'Yes' to the last question, then answer this question: Was the want of repair of the edger a cracked or broken roller or rollers, *or rollers that were worn out of proper form by use?* Answer. Yes." The balance of the findings were to the effect (5) that the throwing of the board or plank back against the plaintiff by the edger was occasioned by the edger being out of repair as aforesaid; (6) that the board or plank complained of was not thrown back against the plaintiff by the edger through the carelessness or negligence of the man who fed the edger alone; (7) that the plaintiff had worked for the defendant six and one-half days when he was injured; (8) that the defendant hired the plaintiff to do the work of a common laborer; (9) that the foreman of the defendant ordered the plaintiff to pass lumber to the man who fed the edger; (9½) that when the plaintiff was ordered to work at the edger the agents of the defendant in charge of the mill and the

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edger knew that the plaintiff was ignorant of such machinery and the dangers to which those who work upon it were exposed; (10) that at the time complained of the plaintiff had not any information or knowledge of saw-mills or edgers, or their operation, or of the dangers to which he was exposed while working at the edger, or how to avoid the injuries to which he was exposed; (11) that the plaintiff was about twenty years of age when he was injured; (12) that the plaintiff had worked at the edger, or in sight of it, one day before he was injured; (13) that the agents of the defendant in charge of the mill knew that the edger was liable on occasions to throw back with great force planks and boards that were passing through it; (14) that neither the defendant nor its agents in charge of the mill and edger in any manner informed the plaintiff that the edger was liable to or could throw back boards or planks that were passing through it, how he could avoid injuries on such occasions, or how he could know when there was danger that planks or boards would be thrown back by the edger; (15) that if the plaintiff had known, when a board or plank stopped in the edger and the feeder was trying to loosen and start the plank, that there was danger that the board or plank would be thrown backward with force by the edger, the plaintiff could have got out of the way and escaped injury; (16) that the plaintiff was not guilty of any ordinary negligence that contributed to the happening of the injury to him; (17) that, if the plaintiff has judgment, he should receive as damages $5,000.

Subsequently, the court having ordered judgment upon said special verdict in favor of the plaintiff and against the defendant, the same was entered accordingly; and from the judgment so entered the defendant appeals.

For the appellant there was a brief by *Fairchild & Fairchild*, attorneys, and *F. C. Winkler*, of counsel, and the cause was argued orally by *H. O. Fairchild* and *Mr. Winkler*.

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For the respondent there was a brief by *Huntington & Cady*, and oral argument by *F. C. Cady*.

CASSODAY, J. The complaint alleges two causes of action. The first consists in negligently providing and using an unsafe, defective, and insecure edger, and stating wherein the same was unsafe, defective, and insecure. In answer to the third question the jury found, in effect, that the edger was at the time out of repair, so that it did not do its work properly and safely. By the fourth question submitted the jury were required to find whether such "want of repair" consisted of "a cracked or broken feed roller or rollers, *or rollers that were worn out of proper form by use.*" To the alternative thus presented the jury simply answered, "Yes." The answer to the fifth question is to the effect that such want of repair caused the board or plank to be thrown back against the plaintiff. From the answer to the fourth question, it is impossible to tell whether the jury found such roller or rollers cracked or broken, *or merely worn out of proper form by use. Carroll v. Bohan*, 43 Wis. 218; *Jewell v. C., St. P. & M. R. Co.* 54 Wis. 617; *Murray v. Abbot*, 61 Wis. 198. It follows that the question submitted was defective, and the answer indefinite and uncertain. Besides, it is strenuously claimed that if such want of repair consisted only in such rollers getting out of proper form by use or wear, then this finding is outside of the issues in the case, and unsupported by the evidence. Certainly no such defect is alleged in the complaint. This is conceded by the learned trial judge in his charge. Counsel for the defendant boldly assert in their printed brief "that there is not a word of proof in the case that either of the rollers . . . were 'worn out of proper form by use' or otherwise." The counsel for the plaintiff fails to point out any evidence tending to prove such fact, and we find none in the record.

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In charging the jury on the question, the learned trial judge says: "One witness said something about some of their feed rollers getting worn out of the true by use." The witness thus referred to appears to have been testifying generally as an expert, under objection, as to boards stopping in such edgers, and the cause of the same, and, among other things, to the effect that where the roller was uneven (higher at one end, or sagging in the middle,— sag in the roller) it would have a tendency to curve the board— run it on an angle rather than run it straight — and thus draw it up, or cause it to go up, to the higher side. But this evidence, on a matter not in issue, did not authorize the submission of such question nor support such finding, in the absence of any evidence tending to prove that either of such rollers was thus out of proper form by use or wear. Besides, there is no finding, and no evidence tending to prove, that the defendant or any of its agents knew that either of said rollers was thus out of proper form by use or wear. Since the jury were thus at liberty to answer the fourth question submitted as they did, without any evidence that either of said rollers was out of proper form by use or wear, it is manifest that such answer cannot be allowed to aid in supporting the judgment.

After the cause was submitted to the jury, they returned and informed the court that they did not understand the fifteenth question as it had previously been submitted, whereupon the court altered the same so as to read as when finally answered. Thereupon the jury again retired, and after awhile again returned with all the questions answered to the effect mentioned in the foregoing statement, except the thirteenth, as to which they found, in effect, "that there was no proof upon which they could base an answer to that question." Thereupon the counsel for the defendant insisted that such answer was equivalent to, and in effect, an answer in the negative, and should be received.

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The court then said to the jury: "You are requested to retire and try to make an answer, yes or no, to that question. If you find that there is testimony in the case that satisfies you that the agents of the defendant did know — in charge of the mill — did know that the machine sometimes, on occasions, threw back planks or boards, that you should say 'Yes' to this question. I think there is something in Mr. Corry's testimony with respect to the dangers. I don't know. Perhaps I am mistaken, but that is my remembrance." Whereupon the court requested the reporter to read to the jury the testimony of Michael Corry. Mr. Corry's testimony was then and there read in full by the reporter to the jury, with the exception of one page of his testimony, which the court informed the reporter he need not read. After the reading of the testimony aforesaid of Michael Corry, with the exception of the page aforesaid, the court addressed the jury as follows: "Now, gentlemen of the jury, I have had this read over to you so that you might have your memory refreshed in respect to what this one witness said, and if you find from fair preponderance of the evidence that the agents of the defendant in charge of the mill in question knew that the edger was liable on occasions to throw back with great force planks and boards that were passing through it, you will say 'Yes' to that question; but if you are not satisfied by a fair preponderance of the evidence that the agents knew that that liability existed, you ought to say 'No,' because the burden of proof upon this, as upon all other questions, is upon the plaintiff, and if the plaintiff has not satisfied you on that subject you ought to say 'No,' and if he has you ought to say 'Yes.' That is all I have to say about it. You can take these questions along with you." The jury then retired, and shortly after returned into court with their verdict, and with the said thirteenth question answered 'Yes.'

To each of such several instructions, directions, and pro-

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ceedings on the part of the court the defendant made timely objections and exceptions. Undoubtedly a trial court may, under certain circumstances, decline to receive a special verdict, and direct the jury to retire for further consultation. *Wightman v. C. & N. W. R. Co.* 73 Wis. 169. But here the finding of an absence of proof was equivalent to answering the question in the negative; and hence the verdict, when first returned, should have been received and entered. *McLimans v. Lancaster*, 63 Wis. 607, 608. But, even if this were not so, yet the reading to the jury of portions of the testimony of one witness, with the comments of the court stated, and omitting other material portions and other testimony on the same subject, under the circumstances mentioned was, as we think, misleading, and tended to the coercion of an affirmative answer from the jury, and hence was error.

It is strenuously claimed on the part of the defendant that there is no evidence to support the finding of the jury to question 9½. Upon that question the court, among other things, charged the jury: "Now you must determine this from the evidence in the case,—from the preponderance of it; and very likely you will have to determine it from inferences drawn from the testimony in the case. . . . I don't remember any testimony at all on that subject, directly in respect to that,—that he told them anything about his acquaintance with machines or machinery; and, if you don't remember any testimony on that subject, or if there isn't any on that subject, you will have to determine it upon inferences that you may draw from what experienced men about machinery of that kind would be likely to know when they saw a man—a stranger—come around their machines. If they were able to tell right along whether he is a person that knows nothing about machines or machinery of that kind they set him to work about, why you will perhaps know about it, and if not you will have to do the best

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you can with that question." These portions of the charge virtually concede that there was no evidence bearing directly upon the subject. They nevertheless authorize the jury to determine that question from inferences drawn from the testimony in the case, if there was any, and, if there was not any testimony on that subject, then that they might determine it from such inferences as they might draw from what experienced men about machinery of that kind would be likely to know when they saw a stranger come around their machines — that they themselves would perhaps know about it, and, if not, then they would have to do the best they could with that question. Every party to an action at law in this state has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference, conjecture, and personal experience. *Washburn v. M. & L. W. R. Co.* 59 Wis. 364; *Hanawalt v. State*, 64 Wis. 87; *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96; *Sasse v. State*, 68 Wis. 537. These instructions were manifestly misleading, and hence erroneous.

The finding of the jury upon the fifteenth question submitted is based entirely upon an hypothetical state of facts which the plaintiff insists did not exist, and hence the impropriety of submitting it, or allowing it to remain as a basis of the judgment, is quite apparent. This court has frequently held that it is not the province of a special verdict to submit questions not in issue, or not controverted because admitted, as in the case at bar, but the same should be limited to material and controverted questions of fact. *Heddles v. C. & N. W. R. Co.* 74 Wis. 257, 258, and cases there cited. But, notwithstanding the submission of some questions not in issue, and others not controverted because admitted, yet the court failed to submit to the jury the most material and principally controverted question of fact in issue as to each of the two causes of action alleged, to wit,

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the negligence of the defendant either in providing and using unsafe and defective machinery, or carelessly and negligently operating the same, and whether the injury in question was caused by such negligence or carelessness. A special verdict not determining all the material and controverted facts in issue is, of course, defective. *Hutchinson v. C. & N. W. R. Co.* 41 Wis. 552; *Kelley v. C., M. & St. P. R. Co.* 53 Wis. 74; *Bell v. Shafer*, 58 Wis. 223; *Kerkhof v. Atlas Paper Co.* 68 Wis. 674; *Pratt v. Peck*, 65 Wis. 471. Certainly a special verdict should be something more than a mere abstract of the evidence. *Ibid.* It is claimed that the counsel for the defendant made no objections to the questions submitted, and made no request to submit such questions of negligence, and therefore waived the same. This would undoubtedly be so where such special verdict is accompanied by a general verdict. *Kelley v. C., M. & St. P. R. Co.* 53 Wis. 74. But where a judgment is based upon a special verdict *alone*, which fails to determine all the material and controverted facts in issue, there can be no such waiver. It is unnecessary here to determine whether such negligence of the defendant may be inferred from the other findings, since there must be a new trial by reason of the other errors mentioned.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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DOOR COUNTY, Appellant, vs. KEOGH and others, imp., Respondents.

April 30 — May 20, 1890.

Parties: Pleading in abatement.

1. In an action upon the official bond of a county clerk, the complaint alleged that he had received money for the redemption of tax certificates held by many different persons, and had converted the same to his own use. The answer, by way of abatement, alleged that the holders of such certificates were necessary parties, but did not name them. *Held*, that such holders were not necessary parties, and a motion to make the answer more definite and certain was, therefore, properly denied.
2. The complaint also alleged that the clerk had failed to deliver three several county orders to the respective payees therein named, but had drawn the money thereon and converted it to his own use. *Held*, that as such payees all stood in the same relation to the controversy, it was not necessary to plead separately the nonjoinder of each in abatement of the action.

APPEAL from the Circuit Court for *Door* County.

During the years 1887 and 1888, the defendant McDonald was county clerk of Door county, and the other defendants are sureties in his official bond as such clerk. This action is upon such bond, three breaches of which are alleged in the complaint. These are: (1) That he failed to deliver to the payees therein named certain county orders, severally drawn upon the county treasurer in favor of three different payees, for claims against the county which had theretofore been allowed by the board of county supervisors, but drew the money thereon from the county treasury, and converted the same to his own use; (2) that he received, as such clerk, a large sum of money for the redemption of numerous tax certificates held respectively by many different persons, and converted the same to his own use; and (3) that he also converted to his own use certain moneys received by him as such clerk for the purchase of fuel for

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the county. This last breach is of no importance on this appeal.

The defendants who are such sureties answered in bar: (1) That defendant McDonald drew the money on the county orders by direction of the owner thereof; (2) a denial that he converted to his own use any redemption moneys received by him; and (3) a denial that the clerk received any money of the county for the purchase of fuel. The sureties also answered in abatement that the respective payees named in such county orders, and the holders of the tax certificates thus alleged to have been redeemed, are necessary parties to the action.

A motion on behalf of plaintiff was thereupon made that the answering defendants be required to make their answer more definite and certain in several particulars therein specified. The motion covers both the answer to the merits and that in abatement. The court denied the motion, and the plaintiff appeals from that portion of the order in that behalf which denies the motion "to compel the pleas in abatement to be set up separately."

For the appellant there was a brief by *R. P. Cody*, attorney, and *Turner & Timlin*, of counsel, and oral argument by *W. H. Timlin*.

Geo. G. Greene, for the respondents.

LYON, J. The portion of the answer in abatement which alleges that the holders of the redeemed tax certificates are necessary parties to the action is not well pleaded, either in form or substance. It is bad in form, because such holders are not named therein or in any pleading in the case. It is an elementary rule that a plea in abatement must give a better writ, which means that when such a plea is interposed for defect of parties their names must be stated therein, as well as that they are living and within the jurisdiction of the court. The answer is bad in substance, be-

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cause it is impracticable, if not impossible, to ascertain who these certificate holders are, and in no view of the case are they necessary parties to the action. This portion of the answer being nugatory, it is idle to require it to be made more definite and certain. The only proper thing to do with it is to strike it out on motion, or, in the absence of such motion, to disregard it.

We do not determine whether the respective payees of the county orders in question are or are not necessary parties. If they are, no good reason is perceived why there should be three answers in abatement, because of their nonjoinder, instead of one, as counsel for plaintiff maintain. The reason urged for thus subdividing the pleading is the plaintiff might think one of the proposed parties should not be brought in while the others should be, and may desire to raise the question by demurrer whether the former is a necessary party. This he cannot do effectually while the pleading is in its present form, because his demurrer would be overruled if any one of such payees is a necessary party. All this is very plausible, but has no application here, because, under the allegations both of the complaint and answer (which is all the information this court has on the subject), the three payees of the county orders in question stand precisely in the same relation to this controversy. If any one of them is a necessary party to this action, each of the others is also. If any one is not, neither is either of the others. Hence the reason given for interposing three answers in abatement, instead of one, is unsound. We can imagine no other valid reason why the pleading should be thus subdivided. We conclude that the plaintiff is not injured by the denial of his motion, and hence that the portion of the order appealed from should not be disturbed.

By the Court.— Order affirmed.

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BROWN, Respondent, vs. THE TOWN BOARD OF SCHOOL DIRECTORS OF THE TOWN OF JACOBS, Appellant.

April 30 — May 20, 1890.

School districts: Orders payable out of general or special fund? Pleading: Presumptions.

In an action against a town board of school directors upon orders drawn upon the town treasurer for debts incurred for school purposes, and made payable "out of any moneys in the school fund not otherwise appropriated," the complaint need not allege that there are moneys in such fund out of which the orders could be paid. Such orders are not payable out of a special fund, and the presumption is that the school officers have performed their duty in raising money for the support of the schools.

APPEAL from the Circuit Court for *Ashland* County.

Action upon school orders, payment of which had been refused by the town treasurer upon whom they were drawn. The orders were all in form like the following:

"$2.50 SCHOOL ORDER. No. 128

"Glidden, Wis., April 13th, 1889.

"*To the Treasurer of the Town of Jacobs:* Pay to F. Ersmann or bearer the sum of two and 50-100 dollars, out of any moneys in the school fund not otherwise appropriated, being for sawing wood District 1.

"GEORGE SELL, Secretary.

"Countersigned: E. A. EATON, President."

The defendant appeals from an order overruling a general demurrer to the complaint.

For the appellant there was a brief by *Cole & O'Keefe*, attorneys, and *Tomkins, Merrill & Smith*, of counsel, and oral argument by *Rublee A. Cole* and *W. M. Tomkins*.

For the respondent there was a brief by *Weisbrod, Thompson & Harshaw*, and oral argument by *A. E. Thompson*.

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COLE, C. J. This action is brought on a number of school orders which were drawn by the secretary of the district upon the town treasurer, and were countersigned by the president of the district. The orders, upon their face, purport to be drawn for debts incurred by the district for school purposes, and were made payable "out of any moneys in the school fund not otherwise appropriated." It appears that the town of Jacobs has adopted the township system of school government, under the provisions of R. S. ch. 27, sec. 516 *et seq.*, and the town constitutes but one school district. The complaint is demurred to because it fails to allege that there were moneys in the school fund of the town out of which the orders in the suit could be paid. Such an allegation we deem unnecessary, because the presumption is that there were moneys in the hands of the town treasurer to pay them. The statute contemplates or requires each school district to annually provide for raising by taxation an amount of money sufficient for the support of the schools the ensuing year; and the presumption is that the officers have discharged their duty in that regard, in the absence of all showing to the contrary. Properly speaking, the orders are not made payable out of a special fund, as defendant's counsel contends, but out of the general school fund in the hands of the treasurer which belongs to the district. There should be funds in the hands of the treasurer to pay the orders, and the rule upon which counsel relies does not apply. The distinction between orders payable out of a particular fund, and those which import a general corporate liability but charged to a particular account, is pointed out in *Reeve v. Oshkosh*, 33 Wis. 477, and must be observed here. As we have said, it was the duty of the school board to provide for the payment of orders issued for the support of the schools, and presumably the officers have performed their duty. It is clear, upon the allegations of the complaint, a cause of action is stated against the district; and it

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is put to its defense if it has any. Upon the facts the plaintiff would be entitled to judgment for the amount of the orders sued on.

By the Court.— The order of the circuit court is affirmed, and the cause is remanded for further proceedings according to law.

BROWN, Respondent, vs. THE TOWN OF JACOBS, Appellant.

April 30 — May 20, 1890.

Town orders: Pleading: General or special fund.

1. In an action upon town orders signed by the chairman of the town board, countersigned by the town clerk, and purporting on their face to have been issued for demands against the town, the complaint need not allege that the claims of the persons to whom the orders were issued were audited by the town board, or that the board authorized the clerk to issue the orders.
2. Town orders payable "out of any moneys in the town fund not otherwise appropriated" are not drawn upon a particular fund, and in an action thereon it need not be alleged that there are moneys in the town funds out of which they could be paid.

APPEAL from the Circuit Court for *Ashland* County.

Action upon several town orders, payment of which had been refused. Each of the orders was in form like the following:

"$61.50 TOWN ORDER. No. 1,038.

"Glidden, Ashland Co., Wis., July 15, 1889.

"*To the Treasurer of the Town of Jacobs:* Pay to Thomas McQueen or bearer the sum of sixty-one and 50-100 dollars out of any moneys in the town fund not otherwise appropriated, being for assessing. C. W. KLINE, Chairman.

"Countersigned: P. J. SCALLON, Town Clerk."

The defendant appeals from an order overruling a general demurrer to the complaint.

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For the appellant there was a brief by *Cole & O'Keefe*, attorneys, and *Tomkins, Merrill & Smith*, of counsel, and oral argument by *Rublee A. Cole* and *W. M. Tomkins*,

For the respondent there was a brief by *Weisbrod, Thompson & Harshaw*, and oral argument by *A. E. Thompson.*

COLE, C. J. This is an action brought upon several town orders which were drawn upon the town treasurer and were made payable "out of any moneys in the town fund not otherwise appropriated." The orders are signed by the chairman of the town board, and are countersigned by the town clerk, and purport on their face to have been issued for a demand against the town. The main objection taken to the complaint is that it is defective because it does not allege that the claims of the persons to whom the orders were issued were audited and allowed by the town board of the town, or that the board authorized the clerk to issue the orders. The objection we consider entirely untenable. The presumption is that the claims were audited and allowed as just claims against the town; otherwise the officers of the town would be guilty of a gross violation of legal duty in issuing orders for their payment. The holder of the orders would certainly show a *prima facie* case against the town when he presented the orders, and would not be bound to show in the first instance that the orders were issued on a claim which had been lawfully audited, or that the clerk was authorized to issue the orders. *Prima facie* the orders were valid obligations against the town, and the clerk was authorized to issue them.

The case of *Hubbard v. Lyndon*, 28 Wis. 674, contains nothing in conflict with this view. There, on the trial, the defendant offered to show that the order in suit was issued in payment of a claim against the town, which claim had not previously been audited by the town board, and the evidence was rejected. This court held that the evidence

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should have been received, because it tended to prove that the order was issued without competent authority.

We cannot presume, upon the facts stated, that the board did not audit the claims for which the orders were issued, or that the clerk issued the orders without authority of law. This would be proper matter of defense, if true, to excuse the failure to pay the orders when demand was made for their payment. It certainly is not necessary for the plaintiff to aver that the accounts for which the orders were issued had been properly audited, and allege that the board had authorized the issuing of the orders.

The objection that the orders were drawn upon a particular fund is clearly untenable. The orders are payable out of any moneys in the town fund not otherwise appropriated. They are payable out of a general fund of the town. The defendant should have funds to pay all orders, or should at least have voted a tax to pay them. Sec. 823, R. S.; *Montague v. Horton*, 12 Wis. 668.

By the Court.—The order of the circuit court is affirmed, and the cause remanded for further proceedings.

MARVIN, Respondent, vs. THE TOWN OF JACOBS, Appellant.

April 30 — May 20, 1890.

Town orders drawn on road fund.

There being no law authorizing the establishment of a separate road fund, town orders purporting to be drawn upon such a fund are payable out of the general fund of the town.

APPEAL from the Circuit Court for *Ashland* County. Action upon the several town orders, payment of which

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had been refused. Each of said orders was in form like the following:

"$10.00 ROAD ORDER. No. 302.

"Glidden, Ashland Co., Wis., July 20, 1889.

"*To the Treasurer of the Town of Jacobs:* Pay to H. Kalvring or bearer, the sum of ten dollars out of any moneys in the road fund not otherwise appropriated, being for inspecting road. C. W. KLINE, Chairman.

"Countersigned: P. J. SCALLON, Clerk."

The defendant appeals from an order overruling a general demurrer to the complaint.

For the appellant there was a brief by *Cole & O'Keefe*, attorneys, and *Tomkins, Merrill & Smith*, of counsel, and oral argument by *Rublee A. Cole* and *W. M. Tomkins.*

For the respondent there was a brief by *Mead & Dixon*, and oral argument by *A. E. Dixon.*

COLE, C. J. This is a suit against the town upon town orders. The objection to the complaint is that the orders are drawn upon a particular fund,—that is, the road fund,—and that it does not appear that there was any money belonging to that fund to pay them. The orders must be deemed payable out of the general fund of the town. We do not understand that there is any provision of law which authorizes the town officers to establish a separate road fund. The orders, therefore, were payable out of the general fund of the town. The fact that the orders stated that they were payable out of the road fund not otherwise appropriated must be understood as merely designating the purpose for which the orders were drawn, and for the convenience of the officers of the town in tracing and adjusting their accounts. *Montague v. Horton*, 12 Wis. 668.

The other objections to the complaint are disposed of by

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the decisions in *Brown v. Town Board*, *ante*, p. 27, and *Brown v. Jacobs*, *ante*, p. 29.

By the Court.— The order of the circuit court is affirmed, and the cause remanded for further proceedings.

McPhee, Respondent, vs. McDermott, imp., Appellant.

April 30 — May 20, 1890.

Contracts: Evidence.

1. In an action for a balance due for cutting and delivering logs under a contract signed by but one of the two defendants, the evidence (showing, among other things, that the plaintiff's written bid for doing the work had been accepted by both defendants, and that the one who did not sign the formal contract had directed his codefendant to execute it on his behalf, and held himself liable to plaintiff for whatever might become due thereon) is *held* to justify the refusal of a nonsuit as to the defendant who did not sign.
2. Evidence as to the work done under the written bid, and the bid itself and its acceptance, were admissible.
3. Evidence that the plaintiff had issued time-checks on the defendant who did not sign the contract, but who paid all such checks, was competent.
4. Evidence of a parol statement as to an account is *held* not to have prejudiced a defendant who afterwards introduced in evidence the account itself, which was substantially as stated.
5. Where a complaint contains two counts or causes of action, an objection to the admission of any evidence under the second cause of action should be made when such evidence is offered.

APPEAL from the Circuit Court for *Ashland* County.

The complaint alleges that the defendants are indebted to the plaintiff in the sum of $414.70, being the balance due upon an express contract for work, labor, etc., and for logs, timber, and lumber sold and delivered and cut, hauled, and logged for and unto them. For a further cause of action it alleges that the defendant *McDermott* accepted a written

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order for the payment to the plaintiff of said indebtedness, drawn upon him by the defendant Sullivan.

The answer admits that the plaintiff performed work and services for the defendant Sullivan in cutting and hauling logs, but denies that said work or any other work was done for the defendant *McDermott*. It alleges further that the defendant Sullivan had paid the plaintiff in full, and that nothing was due to the plaintiff from *McDermott* under the order and acceptance set forth in the complaint.

There was a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant *McDermott* appeals.

For the appellant there was a brief by *Mead & Dixon*, and oral argument by *A. E. Dixon*. They contended, *inter alia*, that the trial court erred in allowing the witness Maxim to state, against the defendant's objection, who were the parties to a written contract. It had been shown that the logs put in by the plaintiff were to be used in filling a bill for Gardiner & Co., for whom the witness Maxim was acting as agent. The plaintiff then sought to show that Gardiner & Co. had a written contract with the defendants jointly for certain timber, and that the timber put in by the plaintiff was to fill that contract, leaving it to be inferred therefrom that the contract of the plaintiff must have been a joint one with both defendants.

For the respondent there was a brief by *Cole & O'Keefe*, attorneys, and *Richard Sleight*, of counsel, and oral argument by *Rublee A. Cole*.

TAYLOR, J. This action was brought against the defendants to recover a balance due the plaintiff for cutting and delivering to them logs and timber. The plaintiff obtained a judgment in the circuit court, and from this judgment the defendant *McDermott* appeals to this court. Sullivan does not appeal.

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The contest upon the trial was not as to the amount alleged to be due the plaintiff upon his contract, but the defendant *McDermott* insisted that he was not a party to the contract, and that he made no contract, either with the plaintiff separately, or jointly with Sullivan. The plaintiff claimed his contract was with Sullivan and *McDermott* jointly, and that both were liable to him thereon. At the close of the plaintiff's evidence a motion for a nonsuit was made in the following language: "The defendant moves for a nonsuit." Motion overruled, and defendant excepted. There is no pretense but that there was sufficient evidence to sustain plaintiff's action as against the defendant Sullivan, and it is claimed by the learned counsel for the respondent that the motion was properly overruled for that reason, even if there was no evidence in the case sufficient to fix any liability on the defendant *McDermott*. We shall not determine whether the defendant *McDermott* can avail himself of the motion for a nonsuit made in that form, since, after a careful reading of the record, we think there was sufficient evidence given on the part of the plaintiff to carry the question of the joint liability of the defendant *McDermott* to the jury. Without making any extended statement of the evidence bearing upon that point, we will simply quote a part of the testimony of the defendant Sullivan on his examination as a witness for the plaintiff. Question. "State whether there was any reason given by *McDermott*, at the time you made this contract, why he did not sign it." Answer. "Not in particular. He said: 'Go in and make the contract, and we would log it together, and put in together.'"

The evidence showed that the plaintiff's proposition in regard to putting in the logs had been accepted by both the defendants, and that a few days afterwards a more formal contract was made, and signed by the plaintiff and Sullivan only. In regard to that matter Sullvan testified: "There was nothing particular said between us before the contract

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was made about the names of the parties that should be in the contract, and nothing in particular afterwards, after the contract was made. *McDermott* said to get the contract signed,— for me to sign his signature on the contract. I will swear positively that the contract was to be between each other. That was understood at the time this tender came in, in *McDermott's* office. We three were there together, and arrived at an understanding at that time, on the 12th of June. It was at the time *McPhee* brought the tender when we three had the talk and agreed upon it. Two or three days after, we made another contract to take the place of this one." This second contract was not signed by the defendant *McDermott.* There is other testimony in the record which directly tends to show that *McDermott* was interested in the contract, and that he held himself liable to the plaintiff to pay him whatever should become due to him in the execution thereof on his part.

It is evident that the learned circuit judge did not err in refusing to nonsuit the plaintiff as to the defendant *McDermott.* There were no exceptions taken to the instructions of the court to the jury, and it is only necessary to consider the exceptions taken on the trial to the evidence offered by the plaintiff, and the exception to the ruling of the court on the objection of the defendant to the introduction of any evidence under the second cause of action stated in the complaint. This objection was made before any evidence was offered in the case. We do not deem it necessary to consider whether the statement of facts in the second cause of action is sufficient or not —*first*, because there was no exception taken to the evidence offered, if there was any such in fact offered, when it was so offered on the trial; and, *second*, because there is sufficient evidence in the case to sustain the verdict and the judgment upon the first cause of action stated. If there was no evidence to sustain the second cause of action, it is to be presumed that the court so instructed the jury.

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The *second* objection was to the question put to the plaintiff: "Whom did you issue the time-checks on?" The answer to this was that they were issued on the defendant *McDermott.* We see no objection to the question or answer. It was clearly competent evidence, as tending to show that the plaintiff considered *McDermott* as the proper person to pay such checks, and all the evidence in the case shows that *McDermott* did in fact pay all the time-checks issued.

The *third* objection is of no consequence, as the plaintiff did not seek to recover on that contract between Sullivan and Gardiner & Co., and, as the witness himself stated during his examination that the contract was not in fact signed by *McDermott*, no damage was done by his first statement that it was so signed. His testimony corrected itself.

Fourth. The defendant objected to the statement of Sullivan, as a witness for the plaintiff, as to what Maxim had stated to him in regard to what was due Sullivan on his contract with Gardiner & Co. This evidence was only a parol statement of the account between Sullivan and Gardiner & Co., and that account was offered in evidence in the case by the defendant *McDermott* himself, and is substantially as stated by Sullivan. We fail to see how that evidence could prejudice the defendant *McDermott* in this action.

Fifth. The defendant moved to strike out the evidence of the plaintiff in regard to the work done under the written bid. It is objected that this evidence was inadmissible because the evidence shows that a few days after the written bid for the work, and the joint acceptance of the same by both defendants, another contract, setting out more particularly the terms of the contract, was only signed by Sullivan; but the contention of the plaintiff was, and there was evidence in the case showing, that, notwithstanding this second written contract, the agreement was that both

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defendants should be liable to the plaintiff on such second contract. In this view of the case, the evidence was clearly admissible. The objection to the introduction of the written bid and acceptance by both defendants was properly overruled for the same reason. It was evidence tending to show that the contention of the plaintiff was according to the facts of the case.

As there was sufficient evidence to sustain the verdict, the refusal of the trial court to grant a new trial on the merits is conclusive upon this court on appeal.

By the Court.— The judgment of the circuit court is affirmed.

DULLANTY, Appellant, vs. THE TOWN OF VAUGHN, Respondent.

April 30 — May 20, 1890.

Towns: Construction of water-works: Unauthorized contract: Ratification.

1. A town board may provide protection against fire by the construction of reservoirs, etc., only when authorized so to do by a resolution adopted at an annual town meeting, as provided by ch. 292, Laws of 1883.
2. An unauthorized contract for the construction of such reservoirs cannot be ratified by the subsequent adoption, at a *special* town meeting, of a non-retroactive resolution giving authority, or by the adoption and use of the reservoirs.

APPEAL from the Circuit Court for *Ashland* County.

Action for the value of labor performed and materials furnished in the construction of two cisterns for the defendant town. The answer was, substantially, a general denial. The principal facts are stated in the opinion. The resolution therein referred to was as follows:

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"It is hereby resolved by the qualified electors of the town of *Vaughn*, Ashland county, Wisconsin, duly assembled at a special town meeting held this 30th day of July, 1887, that all powers relating to villages and conferred upon village boards by the provisions of ch. 40, R. S., and all acts amendatory thereof, excepting those the exercise of which would conflict with the provisions of law relating to towns and town boards, be conferred upon the town board of the town of *Vaughn*."

At the close of the plaintiff's evidence a motion for a nonsuit was granted; and from the judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Cole & O'Keefe*, attorneys, and *Richard Sleight*, of counsel, and oral argument by *Rublee A. Cole*. Upon the question of ratification, they cited *Colby v. Franklin*, 15 Wis. 311; *Mills v. Gleason*, 11 id. 470; *Miller v. Milwaukee*, 14 id. 642; *Brown v. New York*, 63 N. Y. 239; *Land, L. & L. Co. v. Brown*, 73 Wis. 294.

For the respondent there was a brief by *McNeel & Bushnell*, and oral argument by *T. H. Bushnell*.

Orton, J. The unincorporated village of Hurley is in the town of *Vaughn*, and contains more than 1,000 inhabitants. It seems that the said respondent town, in the summer of 1886, organized a fire department and adopted a system of water-works in said village, and built engine-houses, and procured apparatus for such purposes, without any authority of law. Towns have no such original authority, and of course unincorporated villages have no municipal authority whatever. Subd. 10, sec. 892, ch. 40, R. S., gives to all incorporated villages such power and authority; and ch. 292, Laws of 1883, provides that all powers relating to villages and conferred upon village boards by the provisions of said ch. 40, R. S., with certain irrelevant exceptions, are thereby

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"conferred upon towns and town boards of towns containing one or more unincorporated villages, having each a population of not less than one thousand inhabitants, and are made applicable to such unincorporated village or villages, and may be exercised therein *when directed by a resolution* of the qualified electors of the town at the *last preceding annual* town meeting." No such resolution was adopted, as above required, before said fire department was organized, water-works established, engine-houses built, or fire apparatus procured, or during that year, and not until the 30th day of July, 1887, when such a resolution was adopted by the electors of said town at a *special* town meeting called for that purpose.

It appears from the testimony that the plaintiff, early in said summer of 1886, made a bid for, and contracted to construct or excavate, two large water cisterns or reservoirs for such fire purposes in said village of Hurley, but without any regular action of the town or town board, and by some understanding and arrangement with one or more of the supervisors of the town, acting informally and separately, and particularly with one Peterson, one of the supervisors, who seemed to have had some interest in, or to have done work on, the job. The plaintiff claims that the contract price for the work was to be $1,160, and that he performed the contract and constructed the reservoirs, and that the same were at once used and continued to be used by said town for such purposes, and he brings this action for the recovery of said sum.

The evidence is somewhat confused, but the plaintiff speaks of the franchise for the water-works being given to him, and admits that he never had even a talk with the board at any of their meetings, and says that the town used the cisterns and built an engine-house over one of them. The learned counsel of the appellant bases the claim of the plaintiff against the town for this work upon the ratifica-

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tion of it, and of his contract, by the town, by using the cisterns and by passing the said resolution of July 30, 1887. This is the material question in the case. Although there is some evidence tending to show that said Peterson was interested in the work, and that it has been paid for, and as to what the contract was, and the price or value of the work, it is by no means clear that the plaintiff ought not to recover at least something on the merits of the case, if the law allowed it. The court, however, granted a nonsuit, and most probably on the ground of a want of authority of the town to order or contract for such works. It is conceded that the town had no such original authority, but it is contended that such ratification cured such want of authority and made the claim and contract valid.

1. It is not perceived how this subsequent resolution could ratify *works* previously constructed without authority. It has no reference or relation to water-works already constructed. It has no retroactive effect, but is by its terms exclusively prospective. The works must be constructed by the authority of a resolution adopted "at the *last preceding* annual town meeting."

2. The resolution must be adopted at an *annual* meeting. It is true that sec. 788, R. S., provides that any other lawful business may be done at *special* as at annual town meetings. But that is a general power of towns, while this is a special power, given by a special act of the legislature, made for this special purpose, and it must be followed strictly; and its terms are imperative, and must be complied with, or no such power is conferred, by a familiar rule of construction.

3. The ratification, however, does not depend wholly on this subsequent resolution, by the argument of the learned counsel, but also on the adoption of the water-works, and their use and enjoyment of the same, raising an implied liability, at least, to pay for the same. The question, then, is, Can a town ratify and make valid what it has previously

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done without authority, and is absolutely void for that reason? It is a well-established principle of law that it cannot. Dill. Mun. Corp. §§ 384, 385; Mechem, Pub. Off. § 554, and cases cited. This precise question was so decided by this court in *Clark v. Janesville*, 13 Wis. 415. The question of the subscription to the stock of a railroad was submitted to the vote of the people, and the bonds of the city were issued before the charter took effect. It was held that the city, after the charter giving such power took effect, could not ratify and confirm the subscription previously made and the bonds previously issued. The city did everything possible to ratify them. The present chief justice says in the opinion: "The common council could not originally do the act. They could not make the subscription and issue the bonds. With what propriety, then, can it be said that they could by subsequent ratification render them valid? The very notion of ratification presupposes that the party ratifying might have originally done the act or made the contract. This would seem to be a very obvious deduction." *Delafield v. State*, 2 Hill, 160, and 26 Wend. 192, are cited in the opinion, in which it was held that an unauthorized contract entered into by state agents without authority could not be ratified by themselves, and, "if public officers could not originally make the contracts, they could not ratify them." The cases in this court cited by the learned counsel as holding otherwise are those in which the original authority was not wanting; and the chief justice, in the above case, distinguishes it from *Mills v. Gleason*, 11 Wis. 470, on that ground.

This leaves the plaintiff without any valid claim against the town. The nonsuit was properly granted.

By the Court.— The judgment of the circuit court is affirmed.

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MOLEY, Respondent, vs. BARAGER and another, Appellants.

April 30 — May 20, 1890.

Libel: Words actionable per se: "Jackass."

A newspaper article, headed with the plaintiff's name and a picture of a jackass, and referring to the plaintiff as "an egotistical and over-estimated, self-conceited jackass," is libelous *per se*.

APPEAL from the Circuit Court for *Bayfield* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an appeal from an order overruling a demurrer to the complaint in an action for libel. The complaint contains the usual *colloquium*, and alleges the publication, September 13, 1888, of the article in question, which is set out in full, with appropriate innuendoes, and is headed, "HIS HONOR, JAMES MOLEY," followed by a cut,— a representation and picture of a jackass,— and that is followed by the balance of the article, to wit:

"Monday was labor day, and it was celebrated in Washburn in a very fitting manner by a torch-light procession, consisting of about 150 torch carriers, who marched from the K. of L. hall to the town hall, where a well-arranged programme of entertainment was nearly, if not quite, carried out.

"The above item appeared in last week's Itemizer, and had the same effect on an egotistical and over-estimated, self-conceited jackass, who claims the name of *James Moley*, as a red rag would on an enraged bull. The item referred to calls for no apology on our part, as there is not a word in it detrimental to the above-mentioned quadruped or the poor laboring men, nor can it be so construed; therefore we shall make none. We have neither time nor space this week to reply to the article of the above gentleman which

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appeared in the Ashland News, Sunday, but in the future look out for breakers. To be continued."

For the appellants there was a brief by *Cole & O'Keefe*, attorneys, and *Richard Sleight*, of counsel, and oral argument by *Rublee A. Cole.*

For the respondent there was a brief by *Miles & Shea*, and oral argument by *W. F. Shea.*

CASSODAY, J. It has been repeatedly held by this court, in effect, that a written publibation, though not charging a punishable offense, is libelous *per se* if it tends to subject the party to whom it refers to social disgrace, public distrust, hatred, ridicule, or contempt. *Bradley v. Cramer*, 59 Wis. 309, and cases there cited; *Gauvreau v. Superior Pub. Co.* 62 Wis. 410. Upon this demurrer, the allegations of the complaint must be taken as true, and hence the things alleged must be regarded as false, and, as such, knowingly published by the defendant. *Gauvreau v. Superior Pub. Co.* 62 Wis. 407. It is for the court to determine whether a publication is capable of the meaning ascribed to it in the complaint. *Ibid.; Bradley v. Cramer*, 59 Wis. 312. In analogy to numerous cases in this and other courts, we must hold that the publication in question is capable of the meaning ascribed to it in the complaint, and is therefore libelous *per se. Solverson v. Peterson*, 64 Wis. 201; *S. C.* 25 N. W. Rep. 14, and note; *Massuere v. Dickens*, 70 Wis. 87.

By the Court.— The order of the circuit court is affirmed.

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HOPKINS and others, Respondents, vs. STEFAN, Appellant.

May 1 — May 20, 1890.

SALE OF CHATTELS. (1) *Statute of frauds: Original or collateral promise: Instructions to jury.* (2) *Contract made on Sunday: Renewed promise on secular day.* (3) *Bill of particulars.* (4) *Evidence: Account books.*

1. The question being as to whether the defendant was the real purchaser of goods shipped to a third person, a charge to the jury that, unless the defendant promised the plaintiffs, before the goods were delivered, unconditionally, that he would pay for them, and the plaintiffs parted with their goods on the faith of such promise, there could be no recovery, is *held* to have been sufficient upon that point.
2. Though the defendant's original promise to pay for the goods was made on Sunday, he is liable therefor if he renewed the promise on a secular day and the goods were afterwards delivered on a secular day upon the faith of such renewed promise.
3. It appearing by the bill of particulars furnished by the plaintiffs that certain goods charged therein had been paid for, there was no error in striking out such item, on the plaintiffs' motion.
4. The order-books and ledgers of the vendors were admissible in evidence in connection with the testimony of the clerks who made the entries therein and swore to their correctness; and, where the sale and delivery of the goods was abundantly established by other evidence, an error, if any, in the charge to the jury as to the effect of such books as evidence, was immaterial.

APPEAL from the Circuit Court for *Ashland* County.

Action to recover a balance of $544.56, alleged to be due upon an account for goods sold and delivered. A bill of particulars was served. The defendant denied having received certain of the goods, but admitted an indebtedness of $46.83, and tendered judgment for that amount. The trial resulted in a verdict in favor of the plaintiffs for $685.07, and from the judgment entered thereon the defendant appealed. Other facts will appear from the opinion.

For the appellant there was a brief by *Miles & Shea*, and oral argument by *W. F. Shea*. They contended, *inter*

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alia, that the trial court erred in admitting the entries in the order books as evidence, and instructing the jury that they were account books under the statute, and presumptive evidence of the charges contained in them. The books were not such as are made *prima facie* evidence by secs. 4186, 4187, R. S. They were not account books, but a record of orders received. There was no intent to charge the defendant with the goods at the time of the entry of the orders, as appears by the evidence of the persons making the entries, and by the entries themselves. To entitle a book to be received in evidence under the statute it must be a register of business actually done, and not of orders, executory contracts, and things to be done subsequently to the entry. *Fairchild v. Dennison*, 4 Watts, 258; *Wilson v. Wilson*, 6 N. J. Law, 95; *Bradley v. Goodyear*, 1 Day, 104–106; *Terrill v. Beecher*, 9 Conn. 344, 348–9. The entries must have been made for the purpose of charging the defendant with the debt. *Cooper v. Morrel*, 4 Yeates, 341; *Wilson v. Goodin*, Wright, 219.

For the respondents there was a brief by *Tomkins, Merrill & Smith*, and oral argument by *W. M. Tomkins*. They argued, among other things, that the order-books were admissible in connection with the testimony of the clerks who made the original entries in them. They were not prepared to swear positively to a distinct recollection as to the items sold and shipped, but they did swear as to the correctness of the entries, and such entries were admissible as a part and explanatory of their testimony. Abbott's Tr. Ev. 322 (38). The proof was complete and undisputed as to the sale and shipment of these goods to B. Marble, Agent, without the introduction of the books under the statute, and if the plaintiffs failed to comply technically with the statute for the introduction of them as books of account, no harm was done; it was surplusage of proof.

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COLE, C. J. This is an action brought to recover the balance due on an account for goods sold and delivered. There is no dispute as to a large portion of the account, nor in respect to the amount of payments which have been made upon the same. It appears that the plaintiffs are wholesale liquor dealers and druggists, doing business in Milwaukee. Previous to the dealings in question the defendant had been in the saloon business in Ashland, but had sold out his stock and had rented his saloon to one Marble, who for a time continued to carry on the business in his own name. It appears that a traveling salesman of the plaintiffs, by the name of Hadley, sold the goods in controversy either to the defendant or to Marble. Undeniably, the goods were shipped by the plaintiffs to Marble. Hadley testified, in substance, that about February 5, 1887, it being Sunday, he had an interview with the defendant, at Washburn, on the subject of furnishing Marble with goods for his saloon, and that it was then agreed between him and the defendant that the plaintiff should sell and ship liquors to Marble as agent, and charge them to the defendant, who would be responsible for them. The litigated point in the case was whether the goods were really sold to the defendant under this arrangement, upon his credit and promise to pay for them, or whether they were in fact sold to Marble upon the defendant's promise that he would be answerable for the contract price in the event Marble did not pay for them.

There was no promise in writing on the part of the defendant to answer for the default of Marble, as it was essential there should be to hold him upon the collateral promise. But it is insisted on the part of the plaintiffs that the promise of the defendant was an original undertaking, and that the goods were in fact sold to him upon his promise that he would pay for them. There is some conflict in the evidence as to the original agreement upon which the

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goods were sold; but it is very clear that, under the charge of the court upon this question of fact, the jury must have found that, though the goods were shipped to Marble, yet they were sold on the credit of the defendant's promise that he would be responsible for them, and that he was the real purchaser. That being the case, the defendant's promise was an original one, supported by sufficient consideration, and is binding upon him. The court very fairly submitted this question to the jury, and we must assume that the defendant made an unconditional promise to pay for the goods before they were shipped to Marble. In fact and in law, then, he was the real purchaser of the goods and is liable for their payment; for the jury were, in effect, told that, unless they were satisfied from the evidence that the defendant promised the plaintiffs or their agents, before the goods were delivered, unconditionally, that he would pay for them, and that the plaintiffs parted with their goods on the faith of such promise, there could be no recovery against the defendant for the contract price of such goods. This is all that it was necessary for the court to charge on the question as to whether the defendant was or was not the actual purchaser of the goods.

Some errors are assigned on the rulings of the court on the trial. In the bill of particulars which was furnished by the plaintiffs was an item or charge of $46.63 for goods which were shipped to Stefan & Co. The credits showed that these goods had been paid for, and on motion of the plaintiffs this item was stricken out of the bill of particulars. This item was improperly included in the bill of particulars, and was rightfully stricken out. The court had power to allow such an amendment of the bill of particulars, and the ruling could not have prejudiced the defendant.

Another exception taken was to the admission in evidence of the plaintiffs' order-books and ledgers, because it did not

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appear that they contained the original entries or charges for the goods sold and delivered. There was abundant testimony aside from these books to prove a sale and delivery of the goods in dispute. The plaintiffs' clerks and the freight agent of the railroad company testified to the fact, and that evidence was uncontradicted. But we think the order-books were admissible in connection with the testimony of the clerks who made the original entries and swore to their correctness. The fact of a sale and delivery of the goods did not rest upon these entries alone, but was abundantly established by the other proof in the case. So that whatever was said by the court in the charge about the books being account books under the statute, and presumptive evidence of the charges contained in them, was unimportant, even if the charge in that regard was not strictly accurate,— a point it is not necessary, upon the undisputed facts, to decide.

Some instructions were asked on the part of the defendant which were refused. That ruling is excepted to and assigned for error. Without reciting these instructions at length, it is sufficient to say in regard to them that all the law which they embraced which was applicable to the evidence is contained in the charge of the court. We have already alluded to the question as to whether or not the defendant was the actual purchaser of the goods, and what was stated by the court upon that point. According to the testimony of the witness Hadley, the agreement which he made with the defendant about being responsible for goods sold and shipped to Marble was made on Sunday. The court was asked to charge that no cause of action could be maintained on a contract made on Sunday. The court did distinctly charge that a contract made on Sunday was void, and that if a party had to trace his right through such an illegal contract he could not recover. There was evidence that the defendant said to Hadley, a day or two after the

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conversation on Sunday when he made the first promise, "that he would be responsible for anything sold to Marble by Hadley." This is what the witness Ver Plank testified to, who heard that promise. This was a new agreement, made upon a secular day. If the goods were shipped by the plaintiffs and received by the defendant or by Marble on a secular day, on the faith of the defendant's engagement made upon such a day to pay for them, then he would be legally liable to pay for them, though a similar promise may have been made on Sunday to the same effect; and this, in substance, was what the circuit judge charged. The court said also, to the jury, if they should find that the defendant in the case made no promise except the one said to have been made on Sunday, and he having received the goods on a secular or business day, not having made any promise on a secular or business day, they would be justified in bringing in a verdict against him only for the amount he admitted to be due the plaintiffs. This charge was very favorable to the defendant,—as much so as the law would warrant. See *Schmidt v. Thomas*, 75 Wis. 529. In this case the defendant made an oral contract to buy an organ, book, and stool for $65. No money was paid, and there was no delivery at that time. Plaintiff delivered the organ on Sunday. Afterwards, defendant said to plaintiff, in regard to the organ, "I like it first rate," and inquired for the book and stool, which were thereafter delivered. It was held that, though the contract was void under the statute of frauds, and the delivery made on Sunday, the jury were warranted in finding that there had been a subsequent acceptance validating the contract. That case goes further than necessary to sustain this judgment.

We see no errors in the record which should reverse, and the judgment of the circuit court is therefore affirmed.

By the Court.—Judgment affirmed.

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JOHNSON, Respondent, vs. THE ASHLAND WATER COMPANY, Appellant.

May 1 — May 20, 1890.

Master and servant: Injury from negligence: Fellow-servants: Warning of danger.

1. The foreman in charge of the work of laying water-mains for the defendant, was personally engaged in calking certain iron pipes which had been placed for that purpose upon blocks. The plaintiff, while helping him to raise the pipes, was injured by one of them falling from the blocks. *Held*, that the negligence, if any, of the foreman in not properly securing the pipes upon the blocks was the negligence of a fellow-servant of the plaintiff, for which the defendant is not liable.
2. The evidence (stated in the opinion) is *held* not to show a failure on the part of the defendant to employ a sufficient number of men or to furnish proper appliances to do the work safely.
3. Where the dangers of an employment are obvious to any one of ordinary intelligence, the employer is under no legal obligation to warn an employee thereof.

APPEAL from the Circuit Court for *Ashland* County.

This is an action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant company.

At the time of the injury the company was operating water-works at Ashland, and was extending the same. The ditching for the mains was done by independent contractors, and the plaintiff was in their employ. The calking and laying of the pipes in the trenches was done directly by the company, under the supervision of its general superintendent, one Pooley. When he was absent one Gandsey was foreman of the work and had exclusive charge of it. At the time the accident occurred, Pooley was temporarily absent. Gandsey had placed three of the iron pipes upon shingle blocks near the trench, for the purpose of calking them. These pipes were each twelve feet long, six inches in diam-

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eter, and weighed 300 pounds each. One block was placed under each pipe, near the end. Gandsey desired to raise one of the joints about an inch, to place it in a level position. Plaintiff was working upon the trench near the pipes. Gandsey called on him for assistance, and directed him to lift the joint. He did so, using a stick of cord-wood for a lever, when the pipes rolled off the blocks, and one of them fell against and broke the plaintiff's leg, which is the injury complained of.

The negligence alleged was the failure of the company to furnish suitable implements and appliances, and a proper number of men, to do the work safely. Plaintiff was not an expert in the business of laying pipes. Some months later the plaintiff signed a written satisfaction for and release of the company from all damages on account of his injuries. The testimony tended to show that the plaintiff signed such instrument without knowing its contents, and without any intention to release the company.

The foregoing facts were proved on the trial, together with certain other facts stated in the opinion. At the close of the trial the defendant asked the court to instruct the jury to return a verdict in its favor. This proposed instruction was refused. The jury found for the plaintiff, and assessed his damages at $2,000. A motion by the defendant for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

For the appellant there was a brief by *Tomkins, Merrill & Smith*, and oral argument by *W. M. Tomkins*.

A. E. Dixon, for the respondent.

LYON, J. This case was here on a former appeal from an order overruling a demurrer to the complaint. The order was affirmed. 71 Wis. 553. It was there held that, under the facts stated in the complaint, the plaintiff was a servant

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of the defendant company when injured. The facts in that behalf, thus alleged, were substantially proved on the trial. It is therefore *res adjudicata* in the case that the plaintiff was such servant at the time, and is entitled to the same protection as any other servant of the company. It was also held on the former appeal that, if the proximate cause of the injury was the failure of the company to furnish a sufficient number of men to raise the pipes, the company is liable for the injury, unless the circumstances show that the plaintiff assumed the risks incident to doing the work with an insufficient number of men. And it may be observed here that, with the same qualification, the company is liable in like manner if it failed to furnish suitable and proper implements and appliances with which to do the work, and such failure was the proximate cause of the injury.

The questions first to be determined are: Did the company fail to perform its duty in the matter of furnishing either proper implements and appliances or a sufficient number of men for the work? And if it so failed in either or both particulars, was such failure the direct cause of the injury complained of?

1. All that was required to raise the joint, besides a lever (which was conveniently at hand), were suitable blocks for the pipes to rest upon, and suitable wedges to hold the pipes in position. The testimony is undisputed that the company provided these, thus performing its duty in those particulars.

It is not conclusively proved that the pipes were not properly wedged when plaintiff attempted to raise the joint. Indeed the testimony is very strong, if not conclusive, the other way. But this point is not material in the case, for the reason that, if there was negligence in not properly securing the pipes, it was clearly the negligence of Gandsey, who, for that purpose, was a fellow-servant of the plaintiff, and not the representative of the company, which had fully

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discharged its duty to the plaintiff in that respect by furnishing proper implements, etc., with which to do the work. *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338. There are many other decisions of this court to the same effect.

The testimony proves conclusively that the company was not in default for not informing the plaintiff of the dangers incident to the employment. These were visible, and any man of ordinary intelligence, in the exercise of ordinary care, although not an expert in the business, could not have failed to see and comprehend them. In such case, the employer is under no legal obligation to warn the servant of danger. This is elementary law.

2. There is some testimony which tends to show that, in the general business of laying down the pipes, there should be two men employed besides the foreman, particularly in putting the pipes on the blocks for calking, and lowering them into the trench. The plaintiff's witness Jones testified that in order to raise the joints of pipes located as those in question were, and put under them blocks or wedges to hold them in position, "one man can, with a lever, lift the pipe near the joint, safely, while the other man is placing a wedge under; one to lift and the other to put a wedge under would be enough for that purpose." This is just what Gandsey and the plaintiff were doing when the accident happened. Another of plaintiff's witnesses, one Friesenburg, testified that in doing the work he would want three men,—two with a bar each, and one to put under the blocking. But he added "if one man had a bar six or eight feet long, that would answer." The plaintiff had a suitable lever with which to raise the joint. He testified that with it he raised the joint easily. Both these witnesses were experts. The plaintiff testified that two men could have done the work if the pipes were wedged. The testimony above stated is all there is on the subject. Obviously, it fails entirely to prove that more men should have been employed to raise the joint of the pipes.

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Moreover, we do not find any testimony tending to show that, had another man been employed in the work, the accident would probably have been avoided. In the absence of such proof, it is difficult to hold that the failure to employ another man was the proximate cause of the injury complained of.

There being an entire failure of proof that the injury was caused by any negligence of the company in furnishing either men or appliances suitable for the work, and it conclusively appearing that the company was not in default for not informing plaintiff of the dangers of the employment, the court should have directed the jury to return a verdict for the company.

3. The conclusions reached on the other questions in the case render it unnecessary to consider the question of the validity of the alleged release.

By the Court.— The judgment of the circuit court is reversed, and cause will be remanded for a new trial.

BOYINGTON and another, Appellants, vs. SWEENEY, Respondent.

May 1 — May 20, 1890.

Sale of chattels: Delivery: Who to furnish cars? Reasonable time: Delay: Destruction by fire: Counterclaim: Modification of contract: Evidence: Instructions to jury.

1. In a contract for the sale of logs, which were to be cut and hauled to the railroad within a certain time, the vendor agreed to load them upon the cars as ordered by the vendees, and the title was to vest in the vendees as fast as they were loaded. There being no express provision on the subject, it is *held* that the cars were to be furnished by the vendees and within a reasonable time after the logs were ready to be loaded.

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2. Whether a delay of more than two months in furnishing the cars was reasonable or not, was a question properly left to the jury.
3. If, after the vendees were notified that the logs were ready to be loaded, they neglected for an unreasonable time to furnish the cars, and thereafter the logs were destroyed by fire, the loss should fall upon them, and the vendor may recover the contract price of the logs destroyed, as though they had been delivered, less the cost of loading them upon the cars.
4. Such recovery may be had, in an action by the vendees for a failure to deliver the logs, upon a counterclaim setting forth the facts and claiming to recover as for a full performance of the contract.
5. If, after the logs were ready to be loaded, the vendees fully accepted them and, for a valuable consideration, agreed to relieve the vendor from the duty of loading them and to do the loading themselves, the subsequent destruction of the logs was their loss.
6. An instruction that if the jury believe a witness has not stated the truth they may reject his testimony, but that they should not reject it without reason or without due care, *held* not erroneous.

APPEAL from the Circuit Court for *Price* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

The plaintiffs, *Boyington & Atwell*, brought this action against the respondent, *Sweeney*, to recover damages for the nonperformance of a contract of which the following is a copy, viz.:

"This agreement, made and entered into this 15th day of July, 1886, by and between *James Sweeney*, of Price county, Wisconsin, party of the first part, and *Boyington & Atwell*, of Price county, Wisconsin, party of the second part, witnesseth, that said party of the first part does sell to the party of the second part all pine logs cut and to be cut from all lands owned by said party of first part in section thirty (30), and section nineteen (19), township thirty-nine (39), range one (1) east. In consideration of which, said party of second part agrees to pay to said party of said first part, for all logs that will scale twelve inches at top end, and one half sound, the sum of five dollars and fifty cents per thousand feet, board measure, and for all

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logs less than twelve inches at top end, and that will not scale one half sound, the sum of three dollars per thousand feet, board measure. Said party of first part agrees to log at least one million five hundred thousand feet of said logs this summer, and the balance during the spring of 1887, and furthermore agrees to load all logs on cars at Sweeney's side track of Wisconsin Central Railroad Company, as ordered by said party of second part, and to furnish crew enough to load forty cars and more if practicable per day, the logs to be scaled by a competent scaler to be agreed upon by both parties, and further agree that the title to said logs shall vest in the said second named party as fast as loaded on cars, and that said party of first part will forever warrant and defend the title to said logs in second named party free and clear of all incumbrances, payments to be made as follows: One thousand dollars cash, and note for one thousand dollars payable in sixty days without interest; balance of value of first two thirds, when demanded, about November 1st, 1886, of all logs scaled; the remaining one third to be paid January 10th, 1887.

"JAMES SWEENEY, [Seal.]
"BOYINGTON & ATWELL, [Seal.]

"B. H. SUNDERLAND, Witness.
"G. J. ALTRECHT, Witness.

"As amendment to the foregoing contract, party of the first part agrees to load forty cars or more, if in his power.

"JAMES SWEENEY, [Seal.]
"BOYINGTON & ATWELL, [Seal.]

"B. H. SUNDERLAND, Witness.
"G. J. ALTRECHT, Witness."

The plaintiffs allege several breaches of this contract on the part of the defendant: *First*, that the defendant refused to load 1,179,550 feet of said logs on the cars as he contracted to do, and that plaintiffs were compelled to and did pay the sum of $854.19 for loading the same; *second*,

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that plaintiffs had advanced to the defendant on said contract, in money, merchandise, etc., $15,625.43, and $172 to pay the scaler, half of which should be paid by the defendant, making the whole amount advanced $15,711.43, and that the whole contract price of the logs received on said contract was the sum of $14,052.42; *third*, that plaintiffs have requested and demanded of the defendant that he deliver to them all of the pine logs cut by the defendant upon the lands described in the contract during the summer of 1886 and the spring of 1887, or pay back to the plaintiffs the sum so overpaid by them on said contract, and that the defendant has refused so to do. They claim damages for the sum of $1,659, with interest from May 1, 1887, and also for the sum of $854.19 for the expense of loading said logs, and interest from May 1, 1888.

The plaintiffs, as a separate cause of action, claimed the further sum of $541.22 for work and labor performed, and goods sold and delivered to the defendant, and for money paid out and expended by the plaintiffs for the defendant, at his request, between the 6th of July, 1886, and the 1st of December, 1887, and claims judgment for the sum of $2,513.20 with interest from May 1, 1888, and for the further sum of $268.70 with interest from January 1, 1888, and the further sum of $600 damages, etc.

To this complaint the defendant answered, admitting the contract set out in the complaint, and alleging that by said contract the plaintiffs agreed to furnish at said Sweeney's side track sufficient cars on which to load said logs, which the defendant should put and place at said side track, and to furnish the same in a reasonable time after said logs should be put in and placed at said side track by the defendant. The defendant then alleges that, under said contract, he caused to be cut from the lands described in the contract 3,406,538 feet, board measure, and delivered said logs to the plaintiffs at said Sweeney's side track, ready and

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fit to be there loaded on the cars, before the 15th day of March, 1887, and of these logs 3,039,123 feet would scale twelve inches at the top, and were one half sound, and that those that would scale less than twelve inches at the top, or would not scale one half sound, were in amount 367,415 feet. The answer further alleges that at all times from the 15th of March to the 10th of May, 1887, he was ready and willing to load said logs on the cars at said side track, and kept for that purpose a suitable crew of men; that a few days after the 15th of March, 1887, and several times thereafter and before the 10th of May, 1887, he notified the plaintiffs that the logs were at the side track ready to be loaded, and, that he was ready, willing, and desirous of loading the same, and requested the plaintiffs to furnish the cars for that purpose; that during all that time the plaintiffs neglected and refused to furnish any cars at said side track on which to load said logs. And the defendant further alleges that more than a reasonable time to furnish said cars had expired after said logs were placed by defendant at the side track ready to be loaded, etc., and that, by reason of the neglect of the plaintiffs to furnish such cars within a reasonable time for loading the same, the title of said logs, and the risk of injury thereto, had fully vested in the plaintiffs, and that said logs were their property on the 10th day of May, 1887. The answer then proceeds as follows:

"And the defendant alleges that before the fire herein mentioned, and on or about the 10th day of May, 1887, he fully settled with the plaintiffs the said contract and the logging done thereunder and all matters relating to the same, and it was then found and agreed between them that the quantity of logs which the defendant had put in for the plaintiffs under the said contract, and delivered at said side track, was, of the aforesaid first kind, 3,039,123 feet, and of the aforesaid second kind, 367,415 feet, as before stated, and

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that the contract price for the same was $17,817.41; and the plaintiffs then and there accepted the said logs, and all of the same, and assumed and took upon themselves the loading of said logs still remaining unloaded at said side track, at thirty-five cents per thousand feet, and agreed to and with the defendant to charge him that sum per thousand feet for the loading thereof, and the defendant then and there agreed to pay the plaintiffs that sum per thousand feet for their taking upon themselves the loading of said logs.

"And alleges, on information and belief, that at said time the quantity of said logs at said side track, and not loaded on cars, was about 1,900,000 feet, and the said price for loading the same was $665. And he alleges that afterwards, and about the 20th day of May, 1887, said logs at said side track caught on fire, and many of them were removed from said side track to save being burned; and this defendant immediately thereafter replaced the same at said side track ready for loading, and before the commencement of this action fully performed all the terms and conditions of said contract on his part to be done.

"And by reason of the foregoing the plaintiffs became indebted to the defendant in the sum of $17,152.41; and the same was due on the 10th day of May, A. D. 1887, and has not been paid in whole or in part, except so far as hereinafter set forth."

The defendant then answered and by way of counterclaim set up the same facts as above stated in his answer, and claimed that he had fully performed the contract on his part and that there was a balance due him from the plaintiffs on said contract of the sum of $1,526.98.

On the trial in the court below the jury found a verdict in favor of the defendant, and against the plaintiffs, for the sum of $500. The plaintiffs appeal to this court, and allege as errors "(1) that the court below, against plaintiffs' ob-

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jections, admitted immaterial, irrelevant, and incompetent evidence; (2) that the court below erred in its instructions to the jury, and in refusing to instruct them as requested by the plaintiffs; (3) that the verdict is contrary to law and evidence; (4) that the court erred in denying plaintiffs' motion to set aside the verdict and grant a new trial."

For the appellants there was a brief by *Cate, Jones & Sanborn*, and oral argument by *D. Lloyd Jones*.

H. H. Hayden, for the respondent.

TAYLOR, J. The contention made by the learned counsel for the plaintiffs is that, as the written contract between the parties does not state who shall furnish the cars upon which the logs were to be loaded at the switch, it was improper to admit parol evidence for the purpose of showing that the plaintiffs were to furnish them. This objection was not much relied upon by the learned counsel on the argument in this court, and it is evident to us that, in the absence of any evidence on the subject except the contract itself, the learned judge was right in instructing the jury that it was the duty of the plaintiffs to furnish the cars. The duty of the defendant in regard to the delivery of the logs under the contract ended when they were placed on the cars. By the terms of the contract, the plaintiffs were to receive them on the cars, and then the absolute title passed to them. The defendant was in no way bound to pay for the use of the cars on which they were to be loaded, or to pay for their transportation after they were placed on the cars. The plain inference to be derived from the contract is that the plaintiffs were to furnish the cars to receive and transport the logs to their destination. The admission of parol evidence showing that such was the interpretation of the contract by the parties did not, therefore, prejudice the plaintiffs. Had the contract been so uncertain and ambiguous on this point as to have left the matter in doubt as to whose duty

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it was to furnish the cars, it would probably have been competent to show what the understanding of the parties was by parol evidence.

But the more important question raised by the learned counsel for the plaintiffs arises upon the other provision in the contract in regard to the delivery of the logs. The contract, after having described the logs which were to be cut and delivered by the defendant to the plaintiffs, and fixed the price therefor, provides as follows: "Said party of the first part [*Sweeney*, the defendant] agrees to log at least 1,500,000 feet of said logs in the summer of 1886, and the balance during the spring of 1887, and furthermore agrees to load all logs on cars at Sweeney's side track of Wisconsin Central Railroad Company, *as ordered by said party of the second part* [the plaintiffs in this action], and to furnish enough crews to load forty cars and more if practicable per day, the logs to be scaled by a competent scaler to be agreed upon by both parties, and further agree that the title to said logs shall vest in the said second named party as fast as loaded on cars." It is insisted by the learned counsel for the plaintiffs that under this contract the plaintiffs were not under any obligation to require the defendant to load these logs on the cars at Sweeney's landing within any definite or fixed time, and that it was wholly in their discretion when they should be loaded, and that until they ordered them loaded the title to the logs remained in the defendant, and he took all the risks incident to their ownership. On the part of the learned counsel for the defendant, it is contended that, as no time was fixed within which the plaintiffs were bound to require the logs to be loaded, and to furnish cars for that purpose, the law is that the defendant had the right to insist that the cars should be furnished upon which he might load the logs within a reasonable time after he had hauled them to the place of loading, and that the plaintiffs had no right to compel him to take

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the risk of the destruction of the logs by fire or otherwise for an indefinite length of time after he had hauled them to the place for loading and was ready and willing to load the same.

The learned circuit judge on the trial adopted the view taken by the defendant, and held that under the contract the plaintiffs were bound to furnish at Sweeney's side track cars upon which the defendant might load such logs, within a reasonable time after they had notice that the logs were at the track ready to be loaded by the defendant. The evidence shows quite satisfactorily that the logs were all hauled to the side track by the defendant as early as the 15th of March, 1887, and that he was then ready and willing to load the same. It also shows that between that date and the 10th of May next thereafter the defendant on several occasions notified the plaintiffs that the logs were ready for loading, and requested them to furnish the cars for that purpose. It also appears in the evidence that during this time said logs were in danger of destruction by fire on account of the dryness of the weather, and of fires burning in their vicinity, and that the plaintiffs' attention was called to this fact by the defendant. It also appears that on or about the 20th of May, 1887, and before the plaintiffs had furnished any cars on which to load said logs, a large number of them were destroyed by fire without the fault of the defendant. The only real controversy on the trial of this action was as to who should bear the loss of the logs so destroyed. The plaintiffs insist the loss must fall upon the defendant, and the defendant insists that the loss must fall upon the plaintiffs.

The question as to whether the plaintiffs had a reasonable time to furnish the cars after notice of the readiness and willingness of the defendant to load the same, and before the logs were burned, was submitted to the jury, upon all the evidence, by the following instructions, viz.:

"There is no time expressed in the contract when the cars

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should be furnished to transport the logs upon which the defendant was to load them at Sweeney's side track. There being no time fixed in the contract between the parties, the law implies that they should have a reasonable time to furnish them in. And this you will find from the evidence, and take into consideration, in establishing that fact in your minds, all of the facts that have been proven here in regard to this point, remembering that all facts and circumstances that have been made to appear here in the trial of this action are proper for you to consider. Take into consideration the circumstances surrounding the plaintiffs as well as the defendant, and from all this evidence get at the understanding of the parties, as near as possible, from this written contract and from these facts and circumstances that have been established here on the trial of this action. It has been said that 'it is a reasonable time which preserves to each party the rights and advantages he possesses, and protects each party from losses he ought not to suffer.' In other words, you should find whether the plaintiffs delayed longer than a reasonable time in receiving these logs, taking into consideration the evidence showing the condition of the pond as to logs being on hand, the opportunities that the defendant had of knowing those facts, and establish in your mind whether or not the plaintiffs were ready to receive them within a reasonable time, according to the understanding of the parties in this action. The plaintiffs claim that they did not receive all the logs logged under the contract, and it seems to be undisputed that the reason was on account of the destruction and injury of a large portion of these logs, which occurred on the 19th or 20th of May, by fire. And this will be one of the leading questions for you to establish,—on whom the loss of those logs shall fall."

Exceptions were taken to portions of these instructions. Upon consideration of the whole contract, it seems to us

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that these instructions were correct. It would be unjust to the defendant to require him to get out and haul the logs to the place mentioned for loading them on the cars within a specified time, as this contract does, and then require him to keep them there at his risk, for an indefinite period, at the pleasure or caprice of the plaintiffs. The contract must receive a reasonable construction, and such construction as was within the intention of the parties when they made it. It is evident that the defendant would be subject to greatly increased expense in performing the contract on his part if the time for loading them on the cars was to be wholly in the control of the plaintiffs, in addition to the increased risks from fire and otherwise by any unreasonable delay on the part of the plaintiffs in providing the cars for loading; and the contract ought not to receive such construction unless it be plainly so written. The delay in this case after the defendant had the logs ready for delivery on the cars, before their destruction by fire, was over two months; and it was clearly a proper case for the jury to determine, upon the whole evidence in the case, whether the delay was a reasonable one. In this case, upon the evidence, the reasonableness or unreasonableness of the delay was a mixed question of law and fact, and was for the jury. We think the law is well settled that, where there is no time fixed for the doing of an act which a contracting party agrees to do, he must do such act within a reasonable time; and what will in the particular case be a reasonable time depends upon the nature of the act to be done, the nature of the contract, and all the circumstances relating to the same. See *Waterman v. Dutton*, 6 Wis. 265; *Nudd v. Wells*, 11 Wis. 407; Benj. Sales, p. 891, § 1023, and p. 914, § 1048; *Stange v. Wilson*, 17 Mich. 342, 348; *Coon v. Spaulding*, 47 Mich. 162; *Cullum v. Wagstaff*, 48 Pa. St. 300; *Tufts v. McClure*, 40 Iowa, 317; *Cameron v. Wells*, 30 Vt. 633; *Bass v. White*, 65 N. Y. 565; *Myers v. DeMier*,

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52 N. Y. 647; *Sanborn v. Benedict*, 78 Ill. 309; *Sweet v. Harding*, 19 Vt. 587; *Pinney v. F. D., St. P. & P. R. Co.* 19 Minn. 251. There was no error, we think, in these instructions.

Upon the effect of the neglect or refusal of the plaintiffs to furnish the cars within a reasonable time after the logs were delivered at the side track, the court instructed the jury as follows:

"If you find from the evidence in this action that the defendant, at the commencement of spring, had so far completed his contract and performed all conditions thereof on his part, so that all that remained to be done by him was to load the logs on cars, and that he so notified plaintiffs and requested cars to be got for that purpose after he was so ready and before the property was burned, and you also find from the evidence that a sufficient time had intervened before the fire for the plaintiffs to have complied with the request of the defendant, and that a reasonable time had passed from the commencement of the spring and after such demand, in view of all the circumstances of the case, for the plaintiffs to have furnished the cars and for defendant to have loaded the logs thereon before they were destroyed or injured, and there was no agreement that the defendant should load only as requested by plaintiffs, without regard to reasonable time, and the plaintiffs refused to furnish cars or receive said logs during the spring,— in such case the loss or injury occasioned by the fire, if such loss was occasioned without the fault or neglect of defendant, would then be borne by the plaintiffs, and the plaintiffs became and are liable to defendant for the purchase price of the logs as stated in the contract after such quantity is determined by the scale of the scaler agreed upon, as verified by the district scaler."

This instruction was also excepted to by the plaintiffs, and is alleged to be erroneous for two reasons: *first*, it is

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alleged that if the refusal of the plaintiffs to receive the logs, or furnish cars on which to load them, within a reasonable time, would render them liable to the defendant for their destruction by fire after such refusal, the defendant could not avail himself of such liability in this action, because it is claimed that the defendant's counterclaim is for logs sold and delivered to the plaintiffs under the contract, and not to recover for damages for the refusal of the plaintiffs to receive and accept the logs under the contract. We are inclined to hold that this objection should not prevail. The answer sets out all the facts, and, if the facts stated would entitle him to recover as damages the value of the logs destroyed by fire, because the plaintiffs had unreasonably refused to receive the same or furnish cars on which the defendant could load them according to the contract, the defendant should not be turned over to another action because he claims, in his pleading in this case, that the title to the logs, by reason of such neglect and refusal, vested in the plaintiffs. The counterclaim is so pleaded that the defendant is entitled to recover upon either theory of the case; that is, upon the ground that the delay of the plaintiffs in receiving the logs renders them liable for the damage the defendant suffered by their destruction, or upon the ground that, by reason of the defendant's offer to deliver the logs on the cars, and the refusal of the plaintiffs to furnish the cars within a reasonable time so that defendant could make the delivery, the defendant was relieved from making a further delivery of the logs destroyed, and could recover as for logs sold and delivered under the contract.

We think, upon principle and authority, if the defendant was ready and willing to load the logs on the cars, as required by the contract, within a reasonable time after they were delivered at the Sweeney side track, and so notified the plaintiffs, and offered to load them, and they refused and neg-

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lected to furnish the cars for an unreasonable length of time, so that the defendant was prevented from delivering them, and thereafter the logs were destroyed by fire, such offer to load the logs on the cars, and such refusal of the plaintiffs to furnish cars within a reasonable time, released the defendant from making any further delivery of them to the plaintiffs on their contract, and he could recover their value as delivered under the contract, less the cost of loading them on the cars; or the defendant might maintain an action against the plaintiffs for a breach of the contract on their part, and in such action recover as damages the contract value of the logs so destroyed, less the cost of loading the same. See *Danley v. Williams*, 16 Wis. 581; *Ketchum v. Zeilsdorff*, 26 Wis. 514; *Risley v. Smith*, 64 N. Y. 576; *Blood v. Enos*, 12 Vt. 625; *Devlin v. S. A. R. Co.* 44 Barb. 81; Bish. Cont. §§ 1424, 1431; *Dodge v. Rogers*, 9 Minn. 223; *Camp v. Barker*, 21 Vt. 469; *Williams v. Bank*, 2 Pet. 96, 102; *Stewart v. Keteltas*, 36 N. Y. 388; Benj. Sales, p. 980, § 1125, note 6; *Bement v. Smith*, 15 Wend. 493; *Pollen v. Le Roy*, 30 N. Y. 549, 556; *Hunter v. Wetsell*, 84 N. Y. 555; *Bagley v. Findlay*, 82 Ill. 524; *Bell v. Offutt*, 10 Bush, 632, 639; *Ballentine v. Robinson*, 46 Pa. St. 177; *Gordon v. Norris*, 49 N. H. 376, 383; *Shawhan v. Van Nest*, 25 Ohio St. 490; *McLean v. Richardson*, 127 Mass. 339, 345; *Armstrong v. Turner*, 49 Md. 589, 599; *Barton v. McKelway*, 22 N. J. Law, 165; *Hughes v. U. S.* 4 Ct. Cl. 64; *Nichols v. Morse*, 100 Mass. 523.

These authorities clearly show that in this country the courts hold that, in an action upon an executory contract for the sale and delivery of personal property, the vendor may recover the value of the goods contracted for, if he tenders a delivery thereof in accordance with the terms of the contract, and an actual delivery is prevented by the refusal of the vendee to accept or receive the same at the time and place agreed upon. This is especially true in

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cases where the property to be delivered is to be produced by the labor of the vendor after the contract is made. See *Meincke v. Falk*, 55 Wis. 427. Upon the evidence in this case and the instructions of the court, the jury may have found that the defendant tendered a delivery of the logs on the cars as provided by the contract, within a reasonable time, and that the plaintiffs refused to accept such delivery, and refused to accept any delivery thereof within a reasonable time after they were placed at the side track by the defendant. *Ganson v. Madigan*, 13 Wis. 67, 72; *Crawford v. Earl*, 38 Wis. 312, 317; *Chapman v. Ingram*, 30 Wis. 294, 295. In the case at bar the logs were hauled by the defendant to the place where, by the terms of the contract, he was to haul them; and, after having tendered a delivery of them on the cars as required by the contract, the logs were left in the same place subject to the control of the plaintiffs. The facts proved bring the defendant within the rule above stated, which justifies a recovery for the value of the logs as though actually delivered. The only very important question in the case was whether the plaintiffs were bound to furnish cars on which to load the logs within a reasonable time after the 15th of March, when defendant had them on the ground ready for loading. That question having been decided in favor of the claim made by the defendant, settles the question as to the justice of the verdict in favor of the defendant. In this view of the case, all the exceptions of the plaintiffs to the evidence offered on the trial which tended to establish the defense to the action as to the defendant's counterclaim were properly overruled.

But the defendant also set up, both as a defense to the action and by way of counterclaim, a settlement and agreement between the parties, made before the fire occurred, by which the plaintiffs released the defendant from loading the logs on the cars as he had agreed, and by which the

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plaintiffs agreed to load them themselves, for a consideration to be paid them by the defendant, of thirty-five cents per M., and by which settlement and agreement the plaintiffs released the defendant from loading said logs as he had agreed to do under the contract. The evidence on this question of settlement was conflicting and somewhat contradictory. The question was submitted to the jury by the learned circuit judge with the following instructions, viz.:

"It was competent for the parties, after the making of the original contract, to modify or change the condition thereof by subsequent agreement; and such agreement, if made, need not have been in writing in order to effect the modification or change of said contract, provided said new agreement was based upon a valuable consideration; and the burden in that particular is upon the defendant to show that the written contract was modified, and especially as to the plaintiffs' loading logs and relieving the defendant from loading the same. If, therefore, you find from all the evidence in the case that subsequent to the making of the contract, and before the logs were burned, the plaintiffs agreed to relieve the defendant from that condition of the contract as to loading the same, and agreed to do the loading themselves, and the contract was otherwise performed by the defendant at such time, then there was such a complete acceptance of the logs by plaintiffs as would make the loss and injury occasioned by the fire to be borne by them. But the mere fact of the plaintiffs' agreeing to load these logs in controversy, without they agreed to take them at the side track, does not of itself make the plaintiffs liable for their loss; for, by the terms of the written contract admitted in evidence in this case, the title to the logs in dispute did not pass to plaintiffs until they were loaded on the cars. It was, however, competent for the parties to change the provision in this contract as I have stated."

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These instructions are certainly sufficiently favorable to the plaintiffs, and there is no fair ground of complaint on their part. This settlement and agreement was set forth in the answer and counterclaim, and was supported by the positive testimony of the defendant, and his testimony was corroborated to some extent by other evidence in the case. It is true it was denied by one of the plaintiffs and by another witness who claims to have been present at the time the defendant claims such settlement and agreement was made, but the question of the credibility of the witnesses was for the jury, and they may have believed the testimony of the defendant instead of that of the plaintiffs. As there was no special verdict, the jury may have found for the defendant upon this part of his defense and counterclaim.

We see no error in permitting the defendant to show how much and in what manner he had been paid by the plaintiffs upon the contract, nor do we think the court erred in his statement to the jury as to what credit they might give to the testimony of a witness, some of whose statements they believe are false. The sentence excepted to may not, standing alone, be entirely a proper one to make to the jury; but, as qualified by what was said immediately before and after the sentence excepted to, the jury could not have been misled as to this matter to the prejudice of the plaintiffs.[1]

By the Court.— The judgment of the circuit court is affirmed.

[1] The charge of the court upon this point was as follows: "You should not reject the testimony of any witness from mere caprice or without reason, but give the testimony of each witness such weight as you think it is entitled to receive. [If you believe that any of the witnesses have not stated the truth, from their appearance on the stand or on account of their statements being improbable or for any other reason, you can reject his testimony.] But you should not reject it without due care." Plaintiffs excepted to the sentence inclosed in brackets.— REP.

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GRANT, Appellant, vs. THE DIEBOLD SAFE & LOCK COMPANY, Respondent.

May 1 — May 20, 1890.

Contract for benefit of third person: Parties.

The plaintiff, in a contract to do the wood-work and masonry upon a county jail, agreed with the county that he would look solely to the other contractors for any damages caused by their delay. With knowledge of such agreement, the defendant contracted with the county to do the iron-work on the jail in such time as not to delay the plaintiff. *Held*, that for a breach of the latter agreement the plaintiff could maintain an action directly against the defendant.

APPEAL from the Circuit Court for *Ashland* County.

The case is stated in the opinion.

For the appellant there was a brief by *Lamoreux & Gleason*, and oral argument by *C. A. Lamoreux*. They cited *Kollock v. Parcher*, 52 Wis. 393; *Hendrick v. Lindsay*, 93 U. S. 143; *Norwood v. De Hart*, 30 N. J. Eq. 412; *Vrooman v. Turner*, 69 N. Y. 280; *Merriman v. Moore*, 90 Pa. St. 81; *Clodfelter v. Hulett*, 72 Ind. 141.

For the respondent there was a brief by *Dockery & Kingston*, and oral argument by *E. J. Dockery*.

OBTON, J. The plaintiff is the assignee of his partner's interest in the contract, and therefore I will speak of him as the contracting party. The plaintiff entered into a written contract with Ashland county to build a county jail, so far as the wood-work and masonry were concerned, September 7, 1887, in which it was agreed that the county of Ashland should not be liable in any manner for or on account of any damage or delay by any other contractor on said building, but the plaintiff should look solely and exclusively to said other contractor for remuneration for any such damage caused by such other contractor's delay or otherwise. The defendant, a foreign corporation, on the

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same day entered into a written contract with said county to do the iron-work on said building, and in such time as not in any way to delay the builder of said jail. After so setting out the contracts, the plaintiff avers in his complaint that he was the builder of said jail referred to in said last-mentioned contract, and that the defendant knew of these provisions of the contract with the plaintiff, and knew that he could not look to the county for any delay caused by any other contractor, and that he must look to such other contractor therefor, and that said provision in the defendant's contract was made for the benefit of the plaintiff.

There is an averment in the complaint that the defendant, knowing the provisions of the contracts aforesaid, and in view thereof, promised and agreed with the plaintiff that it would be responsible for any and all damages which might be caused the plaintiff by reason of its delay in constructing the iron-work of said jail according to the provisions of its contract with said county, or otherwise. This last averment would seem to be a general conclusion from the foregoing, and not a part of the written contract, or an independent agreement of the defendant, and so the learned counsel of the respondent treat it in their brief. But the learned counsel of the appellant insist in their brief that such special promise and agreement were actually made by the defendant.

At all events, we shall treat the cause of action as depending upon the stipulations of the written contracts. The breach is that the defendant did not construct the iron-work for said jail in the time agreed upon, and thereby greatly delayed and hindered the plaintiff in his part of the work upon said jail, so that the plaintiff was obliged to carry on his part of the work upon said jail at unreasonable times and in small parts, and at great additional costs and expenses, to the plaintiff's damage in the sum of $1,213.10.

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Judgment is demanded for such amount. This is substantially the complaint. The court sustained a demurrer to the complaint on the ground that it stated no cause of action, and this appeal is from such order.

From the fact that the defendant knew of this peculiar provision of the plaintiff's contract, that he should look to the defendant for any damages for delay caused by the defendant, and not to the county, when it entered into its contract with the county not to delay the plaintiff in his part of the work, the two contracts in these respects should be construed together as having direct relation to each other, if not as one contract. In this way the intention of the parties by these provisions is apparent. The county evidently wished to avoid all liability and litigation on account of delays of the plaintiff by the defendant, and make the defendant directly liable to the plaintiff therefor. If the defendant caused delays of the plaintiff's work by failure to do its work in proper time, the county would be liable to the plaintiff therefor, and the county could hold the defendant responsible therefor. It is therefore provided that the defendant should be directly liable to the plaintiff instead of the county, and the county should be exempt from liability. In this view, if the plaintiff's damages had been liquidated when these stipulations were made, the case would be like *Kimball v. Noyes*, 17 Wis. 695, where A. entered into a written contract with B. to pay B.'s debt to C., and it was held that C. could maintain an action against A. in his own name. It is also like *Cook v. Barrett*, 15 Wis. 596, where A. owes B., and C. owes A. the same amount; and it was agreed by and between all the parties that B. should release his debt against A., and look to C. alone for payment. It was held a valid contract, and that B. could recover against C. In this case, calling it a legal liability instead of a debt, the plaintiff released the county, and

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agreed to look to the defendant alone, and the defendant agreed to become responsible to the plaintiff. Why is it not a valid agreement between them all?

But there is another principle equally well established, and that is that a person may recover on an agreement made with another for his special benefit. To illustrate by cases in this court: If one sells chattels to another, and agrees to pay all liens upon them, the persons holding such liens may enforce them against the vendor, because the promise was made for their benefit, although not parties to the agreement. *Kollock v. Parcher*, 52 Wis. 393. Where one sells his land and personal property to another, and the vendee agrees to pay part of the consideration by paying all the debts of the vendor, any holder of any such debt may sue the vendee therefor, and thus avail himself of his promise to the vendor made for his benefit. *Bassett v. Hughes*, 43 Wis. 319. Once for all, the principle laid down in this case, and applicable to all like cases, is: "It is the settled law of this state that when one person, for a valuable consideration, engages with another (whether by simple contract or by covenant under seal) to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement." *Cotterill v. Stevens*, 10 Wis. 422; *Putney v. Farnham*, 27 Wis. 187; *McDowell v. Laev*, 35 Wis. 171; and the cases *supra*, and other cases cited by appellant.

Is this principle applicable to this case? The learned counsel of the respondent contends that it is not, because there is (1) no consideration for the engagement of the defendant not to injure the plaintiff by delays in its iron-work on the jail; and (2) no privity between the parties. In the cases cited above, the consideration in one was the purchase money of the chattels, and in the other the personal property and the land sold; in the first for the vendor to pay

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the liens, and in the other for the vendee and grantee to pay the debts of the vendor and grantor. In all such cases the consideration of the promise is the same as that for any other stipulation of the contract. The consideration of the contract between the two parties for the benefit of a third party is the consideration for the promise to the third party. The defendant, in consideration of the money it was to receive, agreed to do the iron-work of the jail; and agreed further, for the same consideration, to do it in a particular manner and time, so as not to delay and damage the plaintiff. It was a similar consideration between the plaintiff and the county for the plaintiff's release of the county for the delays of the defendant, and for his promise to look to the defendant alone for his damages on account of such delays. Knowing this, the defendant made its agreement for the plaintiff's benefit, instead of the benefit of the county, in consideration of what it was to receive from the county on its contract. As to the *privity* of the parties, there is the same privity as that between the promisor and the promisee in any case, and the same privity as in all the above cases.

It is by no means certain that the defendant would not be liable to the plaintiff, the other contractor on the job, if it should injure him by unnecessary delays in doing the iron-work, without any direct promise not to do so. In such a case there would be a conjunction of wrong and damage or injury which is the basis of liability and constitutes a good cause of action. But this is aside from this case. We are clearly satisfied that the complaint states a good cause of action and is not liable to the demurrer.

By the Court.— The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

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MORROW, Respondent, vs. LANDER, Appellant.

May 1 — May 20, 1890.

(1) Appeal: Bill of exceptions. (2–4) Tax titles: Defect in proof of posting notices: Payment of taxes as condition precedent to relief: Limitation of actions.

1. Where there is no bill of exceptions this court will assume that there was evidence sustaining all the findings of fact by the trial court and disproving all inconsistent inferences.
2. Failure of the proof of posting notices of a tax sale to show that one of such notices was posted in a conspicuous place in the county treasurer's office, invalidates a tax deed issued upon such sale.
3. In an action to set aside a tax deed for such defect, it was not error to refuse to require the plaintiff to pay into court the amount of taxes assessed upon the land *prior* to the sale in question.
4. The limitation prescribed by sec. 3, ch. 309, Laws of 1880, does not apply to an action to set aside a tax deed on that ground.

APPEAL from the Circuit Court for *Brown* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is a bill in equity, commenced December 19, 1888, to set aside a tax deed obtained by the defendant from Brown county, November 7, 1888, for the tax of 1884 and sale of 1885, of a lot in Green Bay belonging to the plaintiff, and as a cloud upon his title. The complaint alleges several defects in the tax proceedings, by reason of which it was claimed that said tax deed was illegal and void, and also alleges a tender to the defendant of $91.72 on account of payment made on said sale and taxes on said lot subsequently thereto. The answer consists of denials and admissions, and pleads the one year statute of limitation.

At the close of the trial the court found, as matters of fact, in effect, that the plaintiff was the owner of the lot described during the times in question; that said lot was assessed in 1884, and said tax thereon returned as delinquent; that the same was sold to the defendant, May 19,

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1885, for an amount stated; that the tax deed in question was issued by said county to the defendant, on said sale, November 7, 1888; that May 20, 1885, the county treasurer filed in the office of the county clerk an affidavit of the posting of notices of said tax sale; that said affidavit failed to state that the county treasurer posted, or caused to be posted, one of said notices in a conspicuous place in the county treasurer's office, and that no other affidavit was filed showing the posting of such notice; that the defendant had paid taxes assessed and levied on said lot since said sale: $18.27, April 30, 1887; $19.49, March 20, 1888; $18, December 21, 1888; that December 19, 1888, the plaintiff duly tendered to the defendant the sum of $91.72, that being the amount of the taxes paid by the defendant before the commencement of this action, as stated, and the amount paid by him on said tax sale, together with interest on all said sums at the rate of twenty-five per cent. from the date of the respective payments, together with all expenses incurred by the defendant in taking out and recording said tax deed; that, at the time of making said tender, the plaintiff requested the defendant to execute to him a release of his interest in said lot by virtue of said tax deed; that the defendant refused to accept said tender, and refused to execute said release; that upon the day of the trial of this action, and before the commencement thereof, the plaintiff deposited the amount of such tender with the clerk of the court.

And as conclusions of law the court found that said affidavit of the posting up of notices of the tax sale for the year 1885 was and is fatally defective; that said tax deed is void, and a cloud on the plaintiff's title to the land described; that the plaintiff is entitled to judgment against the defendant, decreeing that said tax deed be set aside as null and void, with costs and disbursements; that within ten days the plaintiff should pay into court for the defend-

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ant the sum of $18, with interest thereon at the rate of twenty-five per cent. from December 21, 1888, to the day of such payment, and also interest upon said sums of $20.25, $18.27, and $19.49 from December 19, 1888, at the rate of twenty-five per cent. to the day of such payment, and in default of such payment at the time fixed, as aforesaid, the defendant have judgment therein.

The plaintiff having made such payments, judgment was entered upon said findings in favor of the plaintiff and against the defendant, March 3, 1889. From that judgment the defendant appeals.

The cause was submitted for the appellant on the brief of *W. J. Lander*, and for the respondent on that of *Vroman & Sale.*

CASSODAY, J. There is no bill of exceptions. This being so, we must assume not only that there was evidence to sustain each and all the findings of fact, but also evidence disproving any and all inconsistent inferences. The finding to the effect that there was no proof that the requisite notice of sale was posted "in a conspicuous place in the county treasurer's office," was a fatal defect, and necessarily invalidated the tax certificate and deed in question. Sec. 1130, S. & B. Ann. Stats.; *Hilgers v. Quinney*, 51 Wis. 63; *Ward v. Walters*, 63 Wis. 43; *Ramsay v. Hommel*, 68 Wis. 12; *Morris v. Carmichael*, 68 Wis. 133; *Wis. Cent. R. Co. v. Wis. R. L. Co.* 71 Wis. 105, 106. This being so, and unless barred by the statute of limitations pleaded, the plaintiff had the right to maintain this action to remove the tax deed and certificate as clouds upon his title, upon the conditions prescribed by ch. 309, Laws of 1880 (S. & B. Ann. Stats. sec. 1210*h*). Since the defect mentioned did not go to the validity of the assessment nor affect the groundwork of such tax, the plaintiff was required, as a condition precedent to the entry of judgment in his favor, to pay

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into court for the defendant the amount for which such land was sold, and the amount paid by him "for taxes assessed upon the premises *subsequent* to such sale, with interest on all such amounts at the rate of twenty-five per cent. per annum from the times of payment until the said money be so paid into court." Secs. 4, 5, ch. 309, Laws of 1880. Such payment was required by the court, and paid by the plaintiff. There was no error in the refusal of the court to require, as a further condition precedent to the rendition of such judgment, that the plaintiff should also pay into court other taxes assessed on said lot *prior* to said sale, for the simple reason that such additional payment was not required by the statute.

The one year statute of limitation, pleaded by the defendant, simply requires that every action for canceling such tax deed or certificate, and removing the same as clouds upon the title, "for any error or defect going to the validity of the assessment and affecting the groundwork of such tax, shall be commenced within one year from the date of such sale, and not thereafter." Sec. 3, ch. 309, Laws of 1880. But this court has frequently held that where, as here, the error or defect does not go to the validity of the assessment nor affect the groundwork of such tax, the limitation mentioned has no application. *Urquhart v. Wescott*, 65 Wis. 135; *Pier v. Prouty*, 67 Wis. 218; *Ramsay v. Hommel*, 68 Wis. 12; *Morris v. Carmichael*, 68 Wis. 133; *Wis. Cent. R. Co. v. Wis. R. Land Co.* 71 Wis. 106. It follows that such statute was no bar to this action.

By the Court.—The judgment of the circuit court is affirmed.

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WILLES, Appellant, vs. SMITH, Respondent.

May 2 — May 20, 1890.

Sale of land: Option or binding contract? Commission of broker.

A contract for the sale of land, upon which the purchasers paid $200 "as earnest money," provided that an abstract of title should be furnished without delay and a warranty deed delivered within ten days thereafter on receipt of the cash payment and security for deferred payments; and that "if the title is found to be good, and nevertheless not accepted by the purchasers (the deed being tendered) within the time and as herein named, said earnest money is forfeited as the consideration paid for this agreement, and the owner of said premises shall be considered to have fully performed on his part, and may declare the contract terminated. Time is made the essence of the agreement." *Held*, that the purchasers did not thereby merely sectre an option to buy the land, but, if the title was good, were absolutely bound to accept the property and pay for it; and, though the vendor elected to waive a performance on their part and to retain the $200 and the property, a broker who had procured such purchasers for him was entitled to a commission on the sale.

APPEAL from the Circuit Court for *Ashland* County.

Action to recover a commission for finding a purchaser for lands of the defendant. The principal facts are stated in the opinion. The contract therein referred to is as follows:

"Ashland, Wis., March 26, 1887.

"Received of F. A. Seymour and E. C. Long, two hundred and no-100 dollars as earnest money on account of purchase of the following described real estate situated in Ashland county, state of Wisconsin, to wit: Lots thirteen and fourteen (13 and 14), in block one hundred and three (103), of Ellis Division of the town of Ashland, Ashland county, Wisconsin, sold for the sum of four thousand no-100 dollars, on the following terms of payment: One half cash, balance one year from date with interest at eight per cent. per annum. Abstract of title to be furnished without

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delay, and the form of conveyance to be warranty deed, delivered within ten days thereafter upon receipt of cash payments and the securities for deferred payments. And it is agreed and understood by the purchasers that if the title is not good and cannot be made good, this agreement shall be void and the vendor shall not be liable for any damage, and the sum of two hundred dollars, earnest money, paid by the purchasers shall be returned to them. If the title is found to be good, and nevertheless not accepted by said purchasers (the deed being tendered) within the time and as herein named, said earnest money is forfeited as the consideration paid for this agreement, and the owner of said premises shall be considered to have fully performed on his part, and may declare this contract terminated. Time is made the essence of this agreement.

"F. A. Seymour and E. C. Long said purchasers agree to the foregoing terms.

"Said *F. C. Smith* to have possession for ninety days from date by paying rent at the rate of $25 per month.

"E. G. WILLES, FRED C. SMITH,
"MARY FISHER, Owner.
"Witnesses."

At the close of the testimony the circuit court directed the jury to return a verdict in favor of the defendant, and from the judgment entered on such verdict the plaintiff appealed.

The cause was submitted for the appellant on the brief of *Lamoreux & Gleason*, attorneys, and *John W. Willis*, of counsel, and for the respondent on that of *Geo. P. Rossman*.

To the point that the broker's commission is earned when a purchaser able and willing to buy on the terms proposed is found by the broker and introduced to the vendor, counsel for the appellant cited *Stewart v. Mather*, 32 Wis. 344; *Delaplaine v. Turnley*, 44 id. 31; *McGavock v. Woodlief*, 20

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How. 221; *Moses v. Bierling*, 31 N. Y. 462; *Sibbald v. Bethlehem Iron Co.* 83 id. 378; *Glenthworth v. Luther*, 21 Barb. 147; *Duclos v. Cunningham*, 102 N. Y. 678; *Pearson v. Mason*, 120 Mass. 53; *Desmond v. Stebbins*, 140 id. 339; *Magill v. Stoddard*, 70 Wis. 75; *Hamlin v. Schulte*, 34 Minn. 534; *Mooney v. Elder*, 56 N. Y. 238; *Cook v. Kroemeke*, 4 Daly, 268; *Barnard v. Monnot*, 3 Keyes, 203; *O'Connor v. Semple*, 57 Wis. 243, 248; *McClave v. Paine*, 49 N. Y. 561; *Lloyd v. Matthews*, 51 id. 124; *Timberman v. Craddock*, 70 Mo. 638; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Cook v. Fiske*, 12 Gray, 491; *Knapp v. Wallace*, 41 N. Y. 477; *Kock v. Emmerling*, 22 How. 69.

Counsel for the respondent contended, *inter alia*, that where a party is produced and a contract is entered into through the agency of the broker, but the contract is of such a character that the party contracting, by the exercise of an option given him, relieves himself of the obligation to complete the purchase, the broker is not entitled to commission. *Kimberly v. Henderson*, 29 Md. 512. The broker is not entitled to a commission until he obtains a written contract the specific performance of which can be compelled. *Barnes v. Roberts*, 5 Bosw. 73; *Simonson v Kissick*, 4 Daly, 143; *Tombs v. Alexander*, 101 Mass. 255; *Walker v. Tirrell*, id. 257; *Coleman's Ex'r v. Meade*, 13 Bush, 358; *Chapin v. Bridges*, 116 Mass. 105; *Drury v. Newman*, 99 id. 256; *Pierce v. Powell*, 57 Ill. 323; Fitch on R. E. Agency, 105, 108.

Cole, C. J. In March, 1887, the defendant was the owner of certain lots situated in the city of Ashland. He employed the plaintiff, a real-estate broker, to find a purchaser for the lots for $4,000, payable upon specified terms. The plaintiff procured two gentlemen who proposed to buy the lots jointly, and introduced them to the defendant, who accepted them as purchasers; and they definitely agreed to

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purchase the property upon the terms fixed by the defendant, paid the sum of $200 on account of the purchase price, and received the written contract of sale which appears in evidence. The plaintiff sues for his commissions. The learned circuit court, after the evidence on both sides was given, directed a verdict for the defendant on the ground that the purchasers had never completed the purchase; that the written contract was not an absolute agreement of purchase, but that the performance thereof was optional with the purchasers, who refused to carry it out.

There is really no dispute about the facts, and the case turns wholly upon the construction of the contract which was entered into by the parties. By the contract the defendant, in effect, sold the lots in question to Seymour and Long for $4,000, on the following terms: One half cash; the balance to be paid in one year, with interest at the rate of eight per cent. per annum. Abstract of title to be furnished without delay, and the warranty deed to be delivered within ten days thereafter, upon the receipt of cash payment and the securities for the deferred payment. It was agreed and understood by the purchasers that if the title was not good and could not be made good, the agreement should be void and the vendor would not be liable for any damages. Two hundred dollars was paid on the contract when it was executed, as "earnest money." In case the title was not good and could not be made good, the $200 earnest money paid by the purchasers was to be returned to them. The contract then reads: "If the title is found to be good, and nevertheless not accepted by the purchasers (the deed being tendered) within the time and as herein named, said earnest money is forfeited as the consideration paid for this agreement, and the owner of said premises shall be considered to have fully performed on his part, and may declare the contract terminated. Time is made the essence of the agreement." This agreement was signed by

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the defendant, and the purchasers, in writing, agreed to its terms.

Now the plaintiff's contention is that the instrument is a complete and valid agreement of purchase and sale of the property; that if the title was good the vendees were absolutely bound to accept the property and pay the purchase price, unless the vendor elected to waive a performance on their part and retain the property. We think this construction of the contract is the correct one. We have no doubt that the defendant could have enforced a specific performance of the contract had he seen fit to do so. The option given to terminate the contract was for the benefit of the vendor solely. He could insist upon a performance by the vendees, or release them from the contract, retain the $200, and keep the property. The $200 paid was not, strictly speaking, "earnest money," — that is, a sum paid for the purpose of binding the bargain,— though so denominated. It was in the nature of liquidated damages for a breach of the contract in case the vendees refused to perform. But that the purchasers were absolutely bound to accept the property and pay for it according to the terms of the agreement, we think is quite clear. The learned circuit judge held that the contract gave the purchasers an option for ten days to determine whether they would purchase upon the specified terms or not. But this view we deem erroneous. The provision in the contract was intended for the benefit of the vendor, who could avail himself of it at his election, or waive it and enforce performance of the contract by the vendees by a suit in equity. But the vendees were not entitled to avoid the contract, for it was absolutely binding upon them. This is the view taken of a similar agreement by the supreme court of Minnesota in *Dana v. St. Paul Investment Co.* 42 Minn. 194; and we think it is a correct interpretation of such contracts. That was an action to enforce specific performance of the contract, and the court

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held that it was binding upon the vendee, notwithstanding the vendor had the right to avoid the contract at his option; such provision being intended for his benefit, while the contract was obligatory on the vendee. It is true, in this case the vendees did not formally sign the contract, but they assented to its terms in writing, and accepted it. The vendees were unquestionably bound by it. *Lowber v. Connit*, 36 Wis. 176. It is not denied that the abstract was furnished in time, and the title was found to be good. But the defendant saw fit to waive performance and retain the property and the $200 which had been agreed upon as the amount of liquidated damages for a breach on the part of the vendees. It appears, therefore, that the plaintiff procured persons willing and able to purchase the property on the terms fixed by the defendant, and consequently earned his commissions; for the rule of law is well settled in this state that a broker employed to make a sale of property at a price stated or fixed by the owner is entitled to his commissions when he produces a party who makes a purchase. And it is, in general, enough in such a case that the broker produce a party ready to make the purchase at a satisfactory price; and the principal cannot relieve himself from liability by capricious refusal to consummate the sale, or by a voluntary act of his own, disabling him from performance. *Stewart v. Mather*, 32 Wis. 344; *Delaplaine v. Turnley*, 44 Wis. 31; *O'Connor v. Semple*, 57 Wis. 243. There was no failure in this case to produce a purchaser who entered into a valid contract of purchase which could have been enforced. That it was not enforced was no fault of the plaintiff. He performed all he undertook to do, and procured a sale to be made. He is surely entitled to his commissions, though the defendant saw fit to abandon the sale. It is no answer to say the purchasers refused to carry out the contract. The defendant had it in his power to enforce its performance. There is nothing to show that the pur-

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chasers were not responsible, and we cannot presume that they were not. As the plaintiff accomplished all he was employed to do, can there be a doubt about his right to recover his commissions? Under the decisions of this and other courts which are cited on the briefs of counsel, the plaintiff fairly earned his commissions. We do not understand that the defendant's counsel controverted this proposition of law, if the contract entered into was valid and binding upon the purchasers, as we have held it was.

It follows from these views that the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the Court.— It is so ordered.

LOOMIS, Appellant, vs. THE ROCKFORD INSURANCE COMPANY, Respondent.

May 2 — May 20, 1890.

Insurance against fire: Divisible contract: Sale of part of property without consent: Gross premium: Presumption as to rate on separate items.

Three buildings and certain personal property, situated on three different farms, were insured, each for a separate amount, by a policy stating the premium as a gross sum. That sum was 1½ per cent. of the aggregate insurance. *Held*, that the contract was divisible, and that the sale of one of the buildings, in violation of a stipulation against changing the title of the insured property without the consent of the insurer, did not avoid the policy as to the other property situated several miles from the building sold. In the absence of evidence to the contrary it is presumed that each item was insured at 1½ per cent. premium, and the contract is construed as though it was so expressed in the policy.

APPEAL from the Circuit Court for *Dane* County.

This is an action upon a policy of insurance to recover for a loss by fire of a portion of the insured property. The

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first paragraph of the policy is as follows: "*The Rockford Insurance Company* of Rockford, Illinois, in consideration of a note for $16.50, due July 1st, 1886, does insure *G. H. Loomis* and his legal representatives against loss or damage by fire or lightning to the amount of $1,100, as follows: $300 on 1½-story frame dwelling-house No. 1, and additions thereto, including foundation and cellar walls, occupied by —— —— as a private family residence; $200 on house No. 2; $300 on tobacco shed; $300 on tobacco, fodder, hay, or grain on sections 1, 2, and 11, situate, except as otherwise provided, on sections 1, 2, and 11, townships of Burke and Westport, Dane county, in state of Wisconsin,—from the 13th day of January, 1886, at 12 o'clock noon, to the 13th day of January, 1891, at 12 o'clock noon." The note above mentioned was paid at maturity.

It is stipulated in the policy that, if any change takes place in the title to the property insured without the consent of the secretary of the defendant company, the policy shall be null and void. A breach of this stipulation by the insured as to a part of the insured property is relied upon to defeat a recovery in the action.

The testimony introduced on the trial shows, or tends to show, that when the policy was issued plaintiff owned three farms in Dane county,—one in the town of Burke, on section 11, on which is located dwelling-house No. 1, mentioned in the policy; another on section 2 in the town of Westport, several miles distant from the Burke farm, on which house No. 2 therein mentioned is located; and the other on section 1 in Westport, on which stood the insured tobacco shed,—and that the tobacco shed and a quantity of tobacco and hay on section 1 were destroyed by fire August 21, 1888; also, that after the policy was issued, and before the fire, plaintiff sold and conveyed his farm in Burke, including dwelling-house No. 1, without the consent of the secretary of the defendant company. There was some

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testimony which, it is claimed, proves a waiver by the insurance company of the alleged breach of the contract. This feature of the case is not considered in the opinion, and it is therefore unnecessary to state such testimony.

The circuit court held that the contract of insurance is entire and indivisible, and that such conveyance of the Burke farm, on which stood one of the insured buildings, vitiated the whole contract. Whereupon the court nonsuited the plaintiff. The plaintiff appeals from the judgment of nonsuit.

For the appellant there was a brief by *Rogers & Hall*, and oral argument by *W. H. Rogers*.

H. W. Chynoweth, for the respondent.

LYON, J. If, as the learned circuit judge held, the contract of insurance is entire and indivisible, the conveyance by the plaintiff of the Burke farm, on which stood dwelling-house No. 1, without the consent of the secretary of the defendant company, before certain other of the insured property was burned, renders the whole policy null and void, and the nonsuit was properly ordered; otherwise not. In the cases of *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159, and *Schumitsch v. Am. Ins. Co.* 48 Wis. 26, the contracts of insurance there in question were held indivisible. In those cases the property insured consisted of buildings and personal property contained therein, and in the applications for the policies there were misrepresentations by the assured of their title to the realty. In each case the risk was distributed to the different items of property insured. These cases will be adhered to, and the question is whether they rule the present case.

There is some apparent conflict of authority as to the rules by which it is to be determined whether the contract in a given case, which insures several items of property, is an entire contract, or whether it is divisible. An examina-

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tion of the cases will show, we think, that as to a large majority of them the conflict is apparent rather than real. All the cases seem to agree that, although the insurance is distributed to the different items of insured property, the contract is indivisible if the breach of the contract as to an item of the property affects, or may reasonably be supposed to affect, the other items, by increasing the risk thereon.

In *Fire Asso. v. Williamson*, 26 Pa. St. 196, the insurance was upon three *adjoining* buildings,—a specified sum on each,—and the breach of the contract alleged was the keeping of gunpowder in one of the buildings, which caused the burning of them all. The contract was held indivisible. In *Gottsman v. Pennsylvania Ins. Co.* 56 Pa. St. 210, the insurance was distributed upon a barn and certain property in an hotel standing within about sixty feet of the barn. As in the cases in this court above cited, the assured misrepresented his title to the real property, which misrepresentation, by the terms of the policy, invalidated the whole insurance. The property in the hotel was burned. The contract was held indivisible, and the whole insurance forfeited. Several Massachusetts cases are cited in the opinion, among which are *Friesmith v. Agawam M. F. Ins. Co.* 10 Cush. 590; *Brown v. People's M. Ins. Co.* 11 Cush. 280; and *Kimball v. Howard F. Ins. Co.* 8 Gray, 38. These cases, in their essential facts, are in principle like the above cases in this court, except that in the case last cited there was no misrepresentation, but the assured obtained additional insurance upon a portion of the insured property, contrary to the conditions of the policy. *Lee v. Howard F. Ins. Co.* 3 Gray, 583, is also cited. In that case the contract of insurance was held indivisible because, by the terms of the policy, "the property was insured as one risk, and was in fact closely connected together." In *Kelly v. Humboldt F. Ins. Co.* 6 Atl. Rep. (Pa.), 740, the insurance was for a specified

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sum on each of two *connected* buildings, and a house situated in the rear of them. The contract was held indivisible on the authority of the cases in that state above cited. In *Bowman v. Franklin F. Ins. Co.* 40 Md. 620, the insurance was distributed upon a distillery and machinery therein, and there was a breach of the condition as to the real estate which worked a forfeiture of the policy, by its terms. *Lovejoy v. Augusta M. F. Ins. Co.* 45 Me. 472; and *Day v. Charter Oak F. & M. Ins. Co.* 51 Me. 91, are also similar in principle to the two cases in this court first above cited. The property insured in each was a building and its contents, and there was a misrepresentation by the assured of his title to the realty.

None of the above cases seem to have been decided upon the proposition that the contract was entire merely because the premium was not also distributed to the several items of insured property, yet there are expressions in some of the opinions which seem to give weight to that circumstance. But in *Plath v. Minnesota F. M. F. Ins. Asso.* 23 Minn. 479, and *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202, the contracts seem to have been held indivisible mainly upon the ground that the premiums were not so distributed.

The foregoing cases have been referred to at some length because they are chiefly relied upon by the learned counsel for the defendant company to establish the invalidity of the contract of insurance in the present case, and because they are believed fairly to represent nearly all the cases in which such contracts have been held indivisible. The same counsel also cited and relied upon *McGowan v. People's M. F. Ins. Co.* 54 Vt. 211. The facts of that case are not very fully stated, but it may be gathered from the report that the insurance was upon a dwelling-house and personal property in it, and the assured mortgaged the realty contrary to a condition in his policy. It was there claimed that the con-

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tract was divisible, and that the assured should recover the insurance upon the personal property which had been burned, although the policy had become void as to the dwelling-house. The court negatived this claim, and held the contract indivisible. The decision is placed upon the ground that by the terms of the policy the insurer had a lien upon the insured buildings for the payment of assessments upon the premium note, and the cause which rendered the policy void as to the buildings affected such security. The court might well have held, also, that the contract was entire because of the fact that the personal property insured was located in such buildings, and any breach of the contract in respect to the buildings must necessarily affect the risk upon the property therein, to the injury of the insurer. In that case the court laid down general rules for determining whether such a contract is divisible or not. These rules are so reasonable and satisfactory that we feel justified in quoting somewhat at length from the opinion. The court says: "This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but, we think, are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part, void *in toto*,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud or some unlawful act condemned by public policy or the common law; cases where the contract is entire and not divisible; and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible, the different properties insured for separate sums, and the risk upon the property,

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which is claimed to be valid, unaffected by the cause that renders the policy void in part. Such are the cases of *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 455; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164; *Clark v. New England M. F. Ins. Co.* 6 Cush. 342; *Date v. Gore D. M. F. Ins. Co.* 14 U. C. C. P. 548; *Phœnix Ins. Co. v. Lawrence*, 4 Met. (Ky.), 9; *Loehner v. Home M. Ins. Co.* 17 Mo. 247; *Koontz v. Hannibal Savings & Ins. Co.* 42 Mo. 126; *Cucullu v. Orleans Ins. Co.* 6 Mart. (N. S.), 11."

It is believed that the rules thus laid down by the Vermont court do not conflict with any of the cases above referred to, except possibly the two cases in Minnesota and Iowa. The proposition determined in those two cases does not commend itself to our judgments as sound. While the fact that the premium is stated in the policy at a gross sum, and is not distributed to the different items of insured property, is a circumstance to be considered in interpreting the contract, we do not think it is controlling. If two houses, located one mile apart, are insured in the same policy for $1,000 each, and there is nothing to show that they do not belong to the same class of risks, we cannot believe that, merely because the premium is stated in the policy to be $20 on both houses, instead of $10 on each, the contract thereby becomes indivisible, when it would undoubtedly have been divisible had the latter formula been adopted.

In the present case the aggregate of the insurance is $1,100, and the premium is stated in gross at $16.50, which is 1½ per cent. on the amount of the insurance. There is nothing in the policy or testimony to show that the insured property belonged in different classes, upon which are charged respectively different rates of insurance, or that the percentage of premium is an average between higher and lower rates which the parties understood were charged and paid upon different items of the insured property. The presumption is, therefore, that each item was insured at 1½ per

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cent. premium, and the contract should be construed as though it was so expressed in the policy. Had it been so expressed therein, there can be no doubt the contract would be divisible, and so the learned counsel for the defendant company frankly admitted during the argument of the cause.

The views above indicated are fully sustained by the cases of *Clark v. New England M. F. Ins. Co.* 6 Cush. 342; *Havens v. Home Ins. Co.* 111 Ind. 90; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452; *Schuster v. Dutchess Co. Ins. Co.* 102 N. Y. 260; *Loehner v. Home M. Ins. Co.* 17 Mo. 247; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507. Indeed, many of the above cases go much further than this court has gone in asserting the divisibility of such contracts.

It is not denied that the policy in suit was valid when issued. No misrepresentation or breach of warranty on the part of the assured is claimed. But after the policy was issued the assured violated one of its material conditions by conveying to another one of the insured houses without consent of the insurer, which certainly invalidated the policy as to that house. But it is quite impossible to say from the record before us that the risk upon the insured property destroyed by fire, which property was located five miles distant from the house so conveyed, was increased, or in the slightest degree affected, by such conveyance. We are constrained to hold, therefore, that the contract is divisible, and hence that it was error to nonsuit the plaintiff.

By the Court.—The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

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SNYDER and others, Appellants, vs. SNYDER and another, Respondents.

May 2 — May 20, 1890.

Parent and child: Parol agreement to convey or devise land: Specific performance.

A father, after the marriage of his son A., gave him the possession and use of a farm, with the understanding that if he worked it and conducted himself properly it should be devised to him upon the death of the father. After occupying the land for a number of years and having made improvements of the value of $100, A. died. The land was then worth about $4,000. An equal division of the father's estate at that time among his children would have given A. about $3,500. After A.'s death, the father placed another son, G., in possession of the farm, and thereafter, until his own death, used the income of $3,500 in support of A.'s widow and children, and by his will bequeathed that sum to said children, who, by their guardian, accepted the bequest. The farm was devised to G., who had made improvements thereon of the value of about $3,500. *Held*, that there was no agreement to convey the land to A. which could be enforced in favor of his widow or children.

APPEAL from the Circuit Court for *Waukesha* County.

The facts are stated in the opinion. The plaintiffs appeal from a judgment in favor of the defendants.

The cause was submitted for the appellants on the brief of *Carney & Ryan*, and for the respondents on that of *Sumner & Tullar*.

To the point that a parol promise by father to son to convey to him certain land if he would take possession and improve it would be enforced if the son, relying upon such promise, entered upon the land and expended money, work, etc., thereon, counsel for the appellants cited 2 Bing. Real Prop. 318–323; 3 id. 211; *Lobdell v. Lobdell*, 32 How. Pr. 1; *S. C.* 33 id. 347; *S. C.* 36 N. Y. 327; *Freeman v. Freeman*, 51 Barb. 306; *S. C.* 43 N. Y. 34; *Bright v. Bright*, 41 Ill. 97; *Langston v. Bates*, 84 id. 524; *Ungley v. Ungley*, 19 Eng. (Moak), 678; *S. C.* 22 id. 535; *Neales v. Neales*, 9 Wall. 1.

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TAYLOR, J. This action was commenced in the circuit court by the plaintiffs and appellants, against the defendants and respondents, for the purpose of enforcing the specific performance of an alleged parol contract for the conveyance of a specific parcel of land of the alleged value of $8,000. The plaintiff *Theresa Snyder* is the widow of Anthony Snyder, deceased, who died intestate in 1875. The other plaintiffs, *Catharine*, *Susan*, and *Mary Snyder*, are children of the said *Theresa* and Anthony. The defendant *Andrew Snyder, Jr.*, is the executor of the last will and testament of Andrew Snyder, Sr., also deceased, who died in 1887. Andrew Snyder, Sr., was the father of Anthony Snyder, deceased, the husband of the plaintiff *Theresa Snyder*, to whom she was married in 1870. The material allegations in the complaint are the following, viz.:

That soon after the marriage of said Anthony and *Theresa* the said Andrew Snyder, Sr., purchased the eighty acres of land in controversy in his own name, and paid for it with his own money, but it is alleged that he bought it for said Anthony Snyder, and, in consideration of love and natural affection, and services already performed since attaining his majority, and other valuable considerations, the said Andrew Snyder surrendered possession thereof to the said Anthony Snyder, and promised and agreed to make and deliver to him a good and sufficient deed of conveyance of all said premises, if he would work the same and improve it as his own premises. "That, relying on such promises, the said Anthony Snyder, with his family, then took possession of such premises, and worked and improved the same for several years, paid the taxes thereon, cleared and reclaimed the lands for cultivation at great labor and expense, constructed fences, erected valuable buildings, and made other permanent improvements on said premises, thereby greatly increasing the real value thereof, and all this time so managed and controlled and improved said premises, without

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let or hindrance from any one, the same as if they were his own property. That said Anthony Snyder was accidentally killed on or about the 26th day of September, A. D. 1875, while in the operation and possession of said premises as aforesaid, leaving the plaintiff *Theresa Snyder*, his widow, and the said other plaintiffs, his heirs at law, surviving him in the possession of such premises. That after the death of the said Anthony Snyder, the said defendant executor, *Andrew Snyder, Jr.*, was duly appointed the general guardian of said aforesaid minor plaintiffs, and on their behalf and for them, jointly with the other plaintiff in this action, took possession of and managed said premises for them as such general guardian. That after the decease of the said Anthony Snyder, and after the appointment of the said guardian for said minors, the said Andrew Snyder, Sr., died seised of said premises, and without having executed a conveyance thereof to the said Anthony Snyder or his heirs at law, or to any person for them, and that all the plaintiffs have been excluded therefrom, and denied the possession thereof, by such defendant executor. That the said *Andrew Snyder, Jr.*, is the executor of the last will and testament of the said Andrew Snyder, Sr., deceased, duly qualified and acting as such executor under letters issued in that regard out of the county court of said county of Waukesha. That by reason of the several premises aforesaid, the said minor plaintiffs are entitled to a deed of conveyance in fee of the said described real estate, and the other plaintiff is entitled to her dower and statutory rights therein as the widow of said Anthony Snyder, deceased."

The material allegations of the complaint are denied by the answer.

The evidence shows that soon after the purchase of said land by Andrew Snyder, Sr., Anthony and his wife went into the actual possession of said land, and cultivated the same for their own use until the death of Anthony in 1875;

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that while he was so in possession he made improvements thereon of the value of $100 or thereabouts; that, soon after the death of Anthony, Andrew, Sr., took possession of the land, and leased the same, and provided to some extent for the support of *Theresa* and her children. In 1878, Andrew Snyder, Sr., put his son *George* in possession of said land, and *George* remained in possession until the death of his father, Andrew, Sr., in 1887, and while he was so in possession he made permanent improvements thereon of the value of about $3,500. At the death of said Andrew Snyder, Sr., the land, with its improvements, was worth $8,000; and at the date of the death of Anthony Snyder, in 1875, the land and improvements were worth about $4,000. In 1883 the said Andrew Snyder, Sr., made his last will, by which he devised the said eighty acres of land to his son *George Snyder*, and by the same will he bequeathed to his granddaughters, the three children of *Theresa*, plaintiffs in this action, the sum of $3,500, to be paid when they should arrive at the age of twenty-one years, respectively; and he also, by his said will, directed his son, *Andrew Snyder, Jr.*, to pay interest annually at the rate of four per cent. per annum on the sum of $3,500 bequeathed by him to his grandchildren, *Catharine*, *Susan*, and *Mary Snyder*, for their support until they should arrive at the age of twenty-one years respectively. When this will was probated the general guardian of the said grandchildren notified the executor that he should hold him liable to pay said legacies to the said grandchildren according to the terms of said will.

On the trial there was considerable evidence showing that the father of Anthony had frequently stated that he purchased the eighty acres for his son Anthony, and gave it to him, or intended to give it to him; but the general tendency of the evidence went to establish the contention made by the defendant, that the land which Anthony and his other sons had in their possession should be held by the

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father, Andrew, Sr., until his death, and then he would devise the land so held by them, if they conducted themselves satisfactorily to him. The evidence also tends to show that the $3,500 bequeathed to his grandchildren was a reasonable provision for them, estimating the value of his property at the death of his son Anthony.

The learned circuit judge found, among other things, that, at the time of the death of Anthony, "his father, Andrew, Sr., determined to treat the widow and children of his said deceased son as entitled to the use and benefit of what he then considered an equal share of his property, viz., $3,500, and that he would hold said sum of $3,500 in trust for their joint use and benefit during his life-time, to be used and managed by himself, and the income thereof to be expended for them by and under his own direction, and that said sum would go to the said children of his deceased son as a legacy at his death, which determination was duly carried out, as well during his life-time as at his decease." To this finding of fact there is no exception, except the general exception to all the findings of fact. The court also found the following, viz.: "That the subject of disposing of his estate to his children was duly considered by the said Andrew Snyder, Sr., at as early a period as the time when the oldest son, *Andrew Snyder, Jr.*, became twenty-one years of age, to wit, 1861, when he determined that he would not divide his estate nor give any of his property absolutely to his children until his decease, which he would do by his last will and testament, to which he adhered until his death, except as hereinafter set forth, but that he would provide each of his sons, respectively, with a farm, for his use and occupation, as soon after his marriage as he might desire, and that without cost or condition, except that the son should continue to work at home until such marriage, that the taxes thereon should be paid by him as long as he had the use of the same, that he would keep and work it in

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a good and husband-like manner while he occupied it, and that he would behave and conduct himself like a good man, with the understanding that the father would at the time of his death, in case the son should meet those conditions and requirements, devise the same to him by his last will and testament, the title and ownership, however, to be and remain in the father until so disposed of by his said last will and testament; and that he might make money advancements to his daughter as hereinafter set forth." The facts thus found seem to be supported by the evidence as a whole.

Upon these findings of fact, it seems to us that the learned circuit court properly adjudged that there was not sufficient evidence upon which to base a judgment for the specific performance of the alleged parol agreement for the conveyance of the land. From all the evidence in the case, it is apparent that, when Anthony Snyder went into the possession of the farm in question, it was the understanding that no conveyance of the same should be made to him during the life of his father, and, if the title ever came to him, it was to come by a devise, to be made by the will of the father, to take effect at his decease. The son having died more than twelve years before the father, the agreement under which the son entered into possession could not be carried out as the parties intended it should, and there is nothing that a court of equity could enforce in favor of the widow and children. The evidence in the case shows that the deceased, Andrew Snyder, Sr., has not dealt unjustly or inequitably by the widow and children of his deceased son, during his life-time, or at his death. It is evident from the whole tenor of the evidence that the father-in-law and the grandfather has been the mainstay and support of the widow and his infant grandchildren during his life-time, and that, considering his means, he did not deal unjustly by them at his death, and the guardian of the grandchildren accepts

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the provision made for them by the will of their grandfather. There certainly can be no complaint made, so far as the grandchildren are concerned, and, if his omission to make any provision in his will for his daughter-in-law seems to be unjust, it is beyond even the power of a court of equity to remedy the injustice, and it certainly cannot be relied upon as a reason for enforcing a parol agreement for the conveyance of the farm, when the evidence is of such a character as would not justify its enforcement in favor of the children of the deceased Anthony.

The case seems to have been fairly tried, and the judgment of the learned circuit judge is well supported by the evidence.

By the Court.—The judgment of the circuit court is affirmed.

MAY, Respondent, vs. BLACK, imp., Appellant.

May 2 — May 20, 1890.

Corporations: Special remedy against stockholders, where and how enforced: Constitutional law.

1. The constitution of Michigan provides that the stockholders of all corporations shall be individually liable for all labor performed therefor, and a statute of that state provides that "said liability may be enforced by action in *assumpsit*," and that "suit for such labor may be commenced against any or all the stockholders and the corporation jointly." *Held*, that the remedy by action in *assumpsit* is exclusive, and that the corporation must be a party.
2. The remedy thus given against the stockholders can be enforced only in the courts of Michigan.

APPEAL from the Circuit Court for *Fond du Lac* County.

The facts are stated in the opinion. The defendant *Black* appealed from a judgment in favor of the plaintiff.

For the appellant there was a brief by *J. W. Hiner*, at-

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torney, and *Van Dyke & Van Dyke*, of counsel, and oral argument by *Mr. Hiner* and *Mr. G. D. Van Dyke.*

For the respondent there were briefs by *Colman & Sutherland*, attorneys, and *T. W. Spence*, of counsel, and oral argument by *D. D. Sutherland* and *Charles Quarles.* They contended, *inter alia*, that a suit in equity was the proper remedy to enforce the stockholder's liability in this state. *Sleeper v. Goodwin*, 67 Wis. 577; *First Nat. Bank v. Gustin M. C. M. Co.* 42 Minn. 327; Morawetz on Corp. sec. 611; *Taft v. Ward*, 106 Mass. 518; *Pfohl v. Simpson*, 74 N. Y. 137. The remedy given by the Michigan statute is not exclusive, because the right existed under the constitution, prior to and independent of that statute. The constitutional provision was self-executing. Cooley, Const. Lim. 100; *Schricker v. Ridings*, 65 Mo. 208; *Goldman v. Clark*, 1 Nev. 607; Cook, Stock, sec. 222.

ORTON, J. This action was commenced by the respondent on a demand for work and labor, and in behalf of all others having like claims who may come in and become co-plaintiffs, against the Nanaimo Mining Company, a corporation organized under the laws of the state of Michigan, and *John C. Black* and others, stockholders of said corporation residing in this state or amenable to the process of the court. The action is in equity, and the prayer is that the defendant stockholders be decreed and adjudged to pay into court, for the use of the plaintiffs, the amounts due each for such work and labor. No judgment is demanded against the corporation, and it did not appear in the action. It is alleged in the complaint that the corporation is insolvent, and that all of its property has been sold to pay its creditors in attachments. The judgment is at law, that the plaintiff and five others who had become co-plaintiffs "have and recover against the defendant *John C. Black* $1,838.34 and costs, and against John S. McDonald, $529.74

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and costs, and that execution issue in due form of law." The defendant *John C. Black* held stock as assignee of the said McDonald at the time the labor claims for which judgment was rendered against him accrued, and the defendant McDonald held the same stock when such claims for which judgment was rendered against him accrued, and said *Black* was not a stockholder when the suit was commenced, but the said McDonald was. The said *Black* was the cashier of the Continental National Bank of Chicago, and held the stock as such cashier, by assignment from McDonald, as collateral security for a loan made by him of the bank, and not otherwise.

The important questions of law in the case were, therefore: (1) Were the stockholders at the time the debt accrued liable, or those who were such when the action was commenced, or are the stockholders of this corporation liable as copartners or sureties? (2) Could *Black* be held liable, holding such a relation to the stock and the bank? (3) Is this the proper remedy and in the proper jurisdiction? On this appeal these questions were argued before this court by the respective and learned counsel with great force and ability. The third question, of remedy and jurisdiction, should stand first. If this court should hold that the plaintiff has mistaken his remedy or pursued it in the wrong tribunal or jurisdiction, it would be neither necessary nor proper to decide the first two questions. We are compelled by the authorities and the reasons on which they are based to hold in the negative as to both questions.

1. This is a corporation of the state of Michigan, and the liability of its stockholders, and the manner of its enforcement, are governed by the laws of that state. It is a special statutory liability, to be enforced by statutory remedies. Sec. 35, No. 113, of the Public Acts of 1877, of that state, the general law under which this corporation was organized, provides that "the stockholders of all corporations existing

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hereunder shall be individually liable for all labor performed for such corporation, which said liability may be enforced by action in *assumpsit* commenced within two years from the time when payment for such labor became due, and not afterwards." It would seem that an action against stockholders for such labor claims ought to be brought under this statute. But it is contended by the learned counsel of the respondent that, inasmuch as the constitution of that state created this liability without providing any special remedy or method of enforcement, it may be enforced by the usual remedies for the enforcement of any such general liability. The constitutional provision is that "the stockholders of all corporations and joint-stock associations shall be individually liable for all labor performed for such corporation or association." It was held in *Hanson v. Donkersley*, 37 Mich. 184, that this liability is not *primary* but *collateral*, and in a suit under the statute the statutory conditions must be fully complied with; and in *Peck v. Miller*, 39 Mich. 594, it was held that, if the constitutional provision is sufficient to execute itself, it can be only by some proceeding in equity, but that there is no remedy at law to do complete justice in such a case without some aid of statutes.

In *Morley v. Thayer*, 3 Fed. Rep. 737, it is held by Judge CLIFFORD that a similar constitutional provision of Massachusetts could not execute itself, and required legislation to carry it into effect by prescribing the means and mode of its enforcement, and that it is clear that the statutes passed in fulfilment of that requirement constitute the unmistakable rule of decision, and furnish the only basis of judicial action. To the same effect are *Fusz v. Spaunhorst*, 67 Mo. 256; *French v. Teschemaker*, 24 Cal. 518; and *Groves v. Slaughter*, 15 Pet. 449. It is inconceivable how any remedy could be effectual without the aid of statutory provisions. But the plaintiff is estopped from so claiming by his complaint,

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that predicates the action on the statutory liability and refers to the statutory proceedings of the corporation by which the liability was incurred. The action is brought under the statute, and, as a matter of course, the statute must be complied with. The remedy provided by the statute is exclusive of all others. "The statute which creates the corporation may also declare the purpose of its creation, and provide for the manner of its enforcement." *Pollard v. Bailey*, 20 Wall. 520. "Where the statutes of the state which creates a corporation, making the stockholders liable for the corporate debts, provide a special remedy, the liability of a stockholder can be enforced in no other manner." *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747. "Where the statute prescribes expressly the form of the remedy it is the well established rule that that remedy was intended by the legislature to exclude every other, and it must be strictly pursued." Cook, Stock, § 220, and cases cited.

In the same sec. 35 of the above statute, it is provided that "suit for such labor may be commenced against any or all of the stockholders and the corporation jointly; but no levy shall be made upon the property of stockholders under an execution issued upon such judgment until the property of the corporation shall have been exhausted, and the clerk of the court issuing such execution shall indorse thereon a direction to the officer to that effect." Sec. 22 provides, after making it lawful for such corporation to do business in any place in the United States, that "any such corporation shall be subject to the laws of this state in regard to corporations, so far as the same shall be applicable to corporations formed under this act." The remedy is by action in *assumpsit*, and this is exclusive of all other remedies. It is the only action applicable. "The stockholders shall be individually liable for all labor performed." What other action is appropriate? The labor claim is unliqui-

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dated, and therefore debt will not lie. The remedy by *assumpsit* is ample and adequate, and therefore a suit in equity will not lie. There must be a judgment in an action at law to be enforced by *execution* after the property of the corporation is exhausted. The judgment must be against the corporation and stockholders jointly, and so also the execution with the clerk's indorsement thereon to first exhaust the property of the corporation. The fact that the corporation is insolvent, and its property sold, can make no difference. The statute makes no such exception, and it must appear that its property is exhausted, by return to that effect on the execution, before taking the property of the stockholders. This action is nominally in equity, but no relief of an equitable nature is demanded, and it finally resulted in a judgment at law to be enforced by execution. It is held in *Thompson v. Jewell*, 43 Mich. 240, that the action *must* be brought against the corporation and stockholders jointly, and that the word "may" in the statute is permissive and optional only as to the number of the stockholders, as "any or all." In *Milroy v. Spurr M. I. M. Co.* 43 Mich. 231, it is held that such remedy is exclusive, and that the corporation *must* be joined in every case. There is yet another restriction of the remedy. In sec. 37 it is provided that "personal actions against said corporations shall be commenced *only* in the *county* where the mine or smelting or other manufacturing works are situated, or in the county where the business office in *this state* is located." In *Arno v. Wayne Circuit Judge*, 42 Mich. 362, it is held that the legislature had the right to place this restriction on the *venue* of the action, and that when the suit is brought in the wrong county it may be disposed of on "plea in abatement or motion," as in *Haywood v. Johnson*, 41 Mich. 598.

It follows, therefore, that this action is not properly

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brought. It is in equity, when it should be in *assumpsit.* It is brought against stockholders alone, when it should be against them and the corporation jointly.

2. The courts of this state have no jurisdiction in such a case, and it is confined to the courts of the state of Michigan, under whose laws the corporation was created, and by which it is governed. There are two reasons in the act itself why this is so: (1) No jurisdiction can be obtained to render a personal judgment against the corporation anywhere else; (2) actions are limited to a particular place in that state.

But it is a principle of law that does not appear to be questioned, that, where a special remedy against stockholders is prescribed by the statute under which the corporation is formed, it must be enforced in the courts of that state exclusively. Note to *Thompson v. Reno S. Bank,* 19 Nev. 103, 3 Am. St. Rep. 869. Where the act requires judgment to be first obtained and execution to be first issued against the corporation, and its property exhausted, it is contemplated that such judgment must be obtained and the execution issued in the state in which the corporation exists. *Bank v. Bliss,* 89 N. Y. 338; *Dean v. Mace,* 19 Hun, 391. Where the liability and the remedy against stockholders are statutory they are confined in their operation "to the limits of the sovereignty creating the corporation, without extra-territorial force or obligation." *Lowry v. Inman,* 46 N. Y. 119. "A remedy given by the statutes of another state to creditors of a corporation against its stockholders is not available in the state of New York." *Christensen v. Eno,* 106 N. Y. 97. In *Nimick v. Mingo Iron Works Co.* 25 W. Va. 184, it is held that, under a similar statute as to the liability of stockholders of the state of Ohio, the corporation is a necessary party, and that the remedy must be pursued in the courts of that state. "A

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creditor of a corporation established in New Hampshire, the stockholders of which are individually liable for its debts under the statutes of that state, . . . cannot maintain a bill in equity . . . to enforce his claim against the stockholders [in Massachusetts], although some of them live here." *Erickson v. Nesmith*, 4 Allen, 233. Jurisdiction in such a case cannot exist outside of the state where the corporation was created, because it cannot be obtained over the corporation, which is a necessary party. *Patterson v. Lynde*, 112 Ill. 196.

It is not necessary to cite more cases. The principle would seem to be self-evident. We hold, therefore, that this action is not properly brought, nor brought within the proper jurisdiction.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with direction to dismiss the complaint.

AUSTIN, Appellant, vs. SAVELAND'S ESTATE, Respondent.

May 2 — May 20, 1890.

Claims against estates of decedents.

1. An order limiting the time for presenting claims against the estate of a decedent, and a notice by the court, signed at the same time, appointing the times and place for the examination of such claims, are treated as one order and *held* effectually to limit the time for presenting such claims. *Brill v. Ide's Estate*, 75 Wis. 118, distinguished and questioned.
2. A joint and several note executed by the decedent, though not payable until after the expiration of the time limited for presenting claims, should be presented as a claim within that time, and the failure so to present it will bar the holder from a recovery thereon against the estate. Such a claim is not a contingent one, within the meaning of sec. 3858, R. S.

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APPEAL from the Circuit Court for *Milwaukee* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

A short time prior to December 7, 1880, Zachariah Saveland died testate. His will was admitted to probate on that day, and the executors named therein were thereupon appointed as such, and qualified. December 7, 1880, it was ordered by the county court, in effect, that all claims and demands of all persons against said deceased be received, examined, and adjusted before said county court; that six months from and after the said date thereof were thereby allowed and limited to creditors to present their claims against said deceased; and that, within ten days from that date, notice of the time and place at which said claims might be presented, and of the time limited for creditors to present their claims, be given by publishing the same for four weeks successively once in each week, in the Evening Wisconsin, a newspaper printed in the city of Milwaukee. Said order was made and signed: "By the Court. J. E. MANN, County Judge." Upon the same day a notice was thereupon accordingly made and signed: "By the Court. J. E. MANN, County Judge," reciting the granting of letters testamentary on said estate to the executors so appointed, and the allowing and limiting six months from and after that date for creditors to present their claims against said deceased for examination and allowance, and giving notice to the effect that said county court would, at regular terms thereof commencing on the first Tuesdays of May and June respectively, 1881, at the probate office in said city, "examine and adjust all claims and demands of all persons against the said Zachariah Saveland, deceased."

June 26, 1885, the said appellant presented his verified petition to said county court, and therein stated, in effect, that he had a valid claim against said estate which accrued July 19, 1884, and since the expiration of the time allowed

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by law for creditors to present their claims against the same; that said claim consisted of the indebtedness of the deceased upon two promissory notes, each dated April 16, 1879, signed by C. W. Brigham and Z. Saveland, payable five years and three months after date thereof, in and by each of which the said Brigham and Z. Saveland, for value received, severally and jointly promised to pay to said *Edward Austin* or order the sum of $500, and interest thereon, payable annually, at the rate of seven per cent. per annum; that there was due to the petitioner upon said notes the whole amounts named therein, with interest from their date,—and prayed for an order allowing said claim against said estate, and for an order fixing the time and place when and at which the petitioner might be heard upon said claim and prove the same. Thereupon the said county court ordered the said executors to show cause why said claim should not be filed and heard, and providing for the service of such petition and order. July 6, 1885, the said executors appeared by their attorneys, and demurred to said petition upon the ground that it appeared on the face thereof, and from the records and files therein referred to, that said claim was barred by sec. 3844, R. S., and because the petition did not state facts sufficient to constitute a cause of action, and that said court had no jurisdiction to grant the relief sought.

Upon the hearing of said demurrer, September 27, 1888, it was ordered by said county court that the prayer of said petitioner be and the same was thereby denied, and said claim be and the same was thereby disallowed, for the reason that the statutory time had expired in which claims could be filed, proved, and allowed against said estate. From that order and decision the said appellant appealed to the circuit court, when by stipulation an amended verified petition was filed, to the effect stated in the prior petition, and also the facts mentioned, and giving the con-

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sideration of the notes, alleging that the said deceased signed the same as surety for Brigham; that at no time prior to July 19, 1884, could the petitioner have enforced the collection or payment of the same from said estate; that Brigham had failed and neglected to pay said notes, or either of them, or any part thereof, and was insolvent and irresponsible; that said estate consisted of a large amount of real and personal property; that said claim had been presented for allowance within one year after said notes became due and payable, and before there had been any distribution, or order of distribution, of said estate; that there were sufficient assets in the hands of the executors to pay said claim. To that petition the said executors demurred upon the same grounds stated in the demurrer to the former petition. From the order sustaining such demurrer, with costs and leave to amend said petition or claim, the plaintiff appeals.

For the appellant the cause was submitted on the briefs of *Turner & Timlin.* They contended, *inter alia*, that the decedent being merely a surety, and the principal debtor not having defaulted until after the time limited for the presentation of claims against the estate, the claim was a contingent one which might have been presented either under sec. 3858 or sec. 3860, R. S. 3 Addison on Cont. (Morgan's ed.), sec. 1111; *Ernst v. Nau*, 63 Wis. 139; *Mann v. Everts*, 64 id. 372; *Ex parte Adney*, Cowp. 460; *Hoffham v. Fondrinier*, 5 Maule & S. 21; *Woodard v. Herbert*, 24 Me. 358; *Webster v. Lawson's Estate*, 73 Wis. 571; *Logan v. Dixon*, id. 533.

For the respondent there was a brief by *Finches, Lynde & Miller*, and oral argument by *B. K. Miller, Jr.*

Cassoday, J. It is claimed by the learned counsel for the plaintiff that the order made by the county court December 7, 1880, limiting the time for creditors to present their

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claims against said estate to six months from the date thereof, was inoperative as a limitation by reason of the failure therein to "appoint convenient times and places when and where the court" would "receive, examine, and adjust such claims," as indicated in sec. 3839, R. S.; and *Brill v. Ide's Estate*, 75 Wis. 113, is relied upon in support of such contention. In that case the order made by the county court not only failed to make such appointment, but the only appointment made purported to have been made by the "county judge" instead of "the county court," as prescribed in the section cited. The case at bar is clearly distinguishable, in that such appointment purports to have been made: "By the court. J. E. MANN, County Judge," at the same time as the making of the order of limitation. We must therefore regard both papers or orders together as really constituting one order in law, and hence effectual as an order of the court limiting the time for creditors to present their claims against said estate. It may be proper here to say that since the decision of that case we have had some doubt as to its soundness, especially in so far as it is there indicated that such appointment could only be effectual when actually incorporated into the order of limitation itself. That it is the better practice to so incorporate the appointment in such order is manifest, but such incorporation certainly cannot be essential where, as here, they are both made by the same court and at substantially the same time. The extent to which the case cited will be recognized as authority is hereby reserved for future consideration.

The plaintiff's claim was not filed, presented, or exhibited to the court until more than four years after the time so limited for creditors to present their claims for allowance had expired. The statute declares, in effect, that every person having such claim, who fails to exhibit the same to the court "within the time limited for that purpose, shall

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be forever barred from recovering such demand, or from setting off the same in any action whatever." Sec. 3844, R. S. This court has held, as to resident creditors, that such bar does not merely affect the remedy, but extinguishes such right of recovery as to all claims proper to be allowed within the time limited. *Carpenter v. Murphey*, 57 Wis. 541. See *Hartman v. Fishbeck*, 18 Fed. Rep. 291. Since the notes were not due until some years after the time so limited for presenting claims had expired, it is urged that they were not provable against the estate during the time so limited. But sec. 3843, R. S., expressly empowers the court "to try and decide upon all claims which by law survive against or in favor of the executors and administrators," not therein excepted, and to "examine and allow all demands, at the *then present value* thereof, which may be *payable at a future day*, . . . and may offset such demands in the same manner in favor of the estate." So the statute provides, in effect, that when two or more persons shall be indebted on any joint contract, and either of them shall die, his estate shall be liable therefor, and the claim may be allowed by the court as if the contract had been joint and several. Sec. 3848, R. S. By the notes in question, the deceased and Brigham, "*severally* and jointly, promised to pay" the amounts named to the plaintiff or order. Manifestly, these notes were provable as a claim against the estate within the time limited in the order. This disposes of the contention that the notes in question constituted a contingent claim within the meaning of sec. 3858, R. S., and hence provable within the time prescribed by sec. 3860, R. S., as construed by this court. *Ernst v. Nau*, 63 Wis. 134; *Mann v. Everts*, 64 Wis. 372; *Logan v. Dixon*, 73 Wis. 533; *Webster v. Estate of Lawson*, 73 Wis. 561. The plaintiff was not liable thereon as security for the deceased, and the same was not a contingent claim against

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the estate, which could not be proved as a debt before the court, within the meaning of sec. 3858, R. S. The "several and joint" liability of the deceased and Brigham to the plaintiff was an absolute liability, and it was none the less absolute because the notes did not become due until after the time limited in the order. A contingent claim, within the meaning of the statutes, is one where the absolute liability depends upon some future event, which may never happen, and which therefore renders such liability uncertain and indeterminable. *Sargent's Adm'r v. Kimball's Adm'r*, 37 Vt. 320; *Edwards v. Roepke*, 74 Wis. 575; *Foster v. Singer*, 69 Wis. 392. This is not such a claim.

By the Court.—The order of the circuit court is affirmed.

ELLIS, Respondent, vs. THE NORTHERN PACIFIC RAILROAD COMPANY, imp., Appellant.

May 3—May 20, 1890.

(1, 2) Action to quiet title: Parties: Joinder of causes of action: Void deed. (3) Counties: Donation of lands to railroad.

1. In an action to quiet title to land all persons interested in the subject matter adversely to the plaintiff may be made defendants, and the fact that defendants' claims arise from different sources and are in conflict with each other, or that one of the defendants claims all the land and the others separate parcels thereof, does not render their joinder as defendants improper, or make the complaint multifarious.
2. Under sec. 3186, R. S., the action to quiet title may be maintained against one claiming under a void deed.
3. A conveyance of its lands by a county as a donation to a railroad company is void; and the legislature, having no power to authorize such donation in the first instance, cannot by a subsequent statute validate the conveyance.

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APPEAL from the Circuit Court for *Douglas* County.

The facts are stated in the opinion.

For the appellant there was a brief by *Catlin & Butler*, attorneys, and *I. C. Sloan*, of counsel, and oral argument by *Mr. Sloan*. They contended, *inter alia*, that the complaint sets out distinct, independent, and unconnected causes of action. The controversy between the plaintiff and the railroad company recognizes the fact that the county owned the lots when it conveyed to the railroad company, and relates only to the validity of that conveyance. The controversy between the plaintiff and the other defendants, respectively, is as to whether the tax deeds to the county were sufficient to extinguish the original title, and this controversy is still further complicated by conflicting claims between such other defendants. The complaint is therefore multifarious. Story's Eq. Pl. sec. 271; *Saxton v. Davis*, 18 Ves. 80; *Banks v. Walker*, 2 Sand. Ch. 347; *West v. Randall*, 2 Mason, 181; *Att'y Gen. v. St. John's College*, 7 Sim. 241; *Ward v. Duke of Northumberland*, 2 Anst. 469; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Cambridge W. Works v. Somerville D. & B. Co.* 14 Gray, 193; *Pope v. Leonard*, 115 Mass. 286–90; *Winsor v. Bailey*, 55 N. H. 218; *White v. Curtis*, 2 Gray, 467; *Salvidge v. Hyde*, Jac. 151; *S. C.* 5 Mad. 138; *Pearse v. Hewitt*, 7 Sim. 471; *Whaley v. Dawson*, 2 Sch. & Lef. 367–71; *Dilly v. Doig*, 2 Ves. Jr. 486; *Lull v. Fox & Wis. Imp. Co.* 19 Wis. 101; *Hubbell v. Lerch*, 58 N. Y. 237. The legislature had power to authorize the county to convey the land in question to the railroad company. There is no difference in principle whether money is donated to a railroad company, or the county is authorized to subscribe for stock. The whole question in both cases is whether the purpose or use of the money is public or not. *Queensbury v. Culver*, 19 Wall. 83; *Railroad Co. v. Otoe*, 16 id. 667; *Olcott v. Supervisors*, id. 678; *Louisville v. Savings Bank*, 104 U. S. 469–79:

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Fairfield v. Gallatin Co. 100 id. 47; *Moultrie v. Fairfield*, 105 id. 370–80.

For the respondent there was a brief by *D. E. Roberts*, and oral argument by *Mr. Roberts* and *W. F. Bailey*.

COLE, C. J. This is an action to quiet title to certain lots of lands described in the complaint. The plaintiff alleges that he is the owner and in the actual possession of the lands, deriving his title from the county of Douglas under certain deeds. He sets out, not only his own chain of title, but also the title of the different defendants to the action. The defendants derive their title from different sources, and their claims are in conflict, though they are all interested in the subject matter of the litigation adversely to the plaintiff. The defendant Bradford appeared and answered; the defendant Sage made a general appearance for himself; and the railroad corporation filed a demurrer to the complaint on the ground of misjoinder of causes of action, and also upon the further ground that the complaint does not state a cause of action. The demurrer was overruled by the circuit court, and from the order so overruling the demurrer this appeal is taken.

The first question to be considered is as to the multifariousness of the complaint. It is insisted that the complaint unites perfectly independent and distinct causes of action, which cannot be joined. To this objection the learned circuit judge gives a complete and satisfactory answer in his opinion filed in the case. He says, in substance, that in cases of this character the object sought is to bring all parties before the court who are interested in the subject matter of the action adversely to the plaintiff, to the end that all interests may be determined and all parties bound by a single decree; and that a court of equity in such cases has power to determine the rights of all the parties, including

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the conflicting rights of the defendants as between each other. This, we think, is a correct view of the law upon this subject. All the defendants, though their respective claims spring from different sources, have a common interest in the point in litigation, and ought to be joined in order to settle the plaintiff's title. The fact that the railroad company claims all the lands, and the other defendants claim separate parcels, does not render the joinder of all as defendants improper, nor make the complaint multifarious. This is the fair result of the decisions in *Winslow v. Dousman*, 18 Wis. 457; *Blake v. Van Tilborg*, 21 Wis. 672; *Hamlin v. Wright*, 23 Wis. 492; *Bassett v. Warner*, 23 Wis. 673; *Leinenkugel v. Kehl*, 73 Wis. 238. "A complaint does not improperly unite several causes of action which relates to matters of the same nature all connected with each other, and in which all the defendants are more or less interested or concerned, though their rights in respect to the general subject of the action may be different, and some may be directly interested only in a part of the general claim." *Blake v. Van Tilborg*, 21 Wis. 672. We do not think the complaint is open to the objection of being multifarious.

The other ground of objection raises the question as to the validity of the company's deed from the county of Douglas. It appears that the county offered and agreed to convey to the railroad company all lots and lands belonging to it which had been acquired by deed, and to which the county had held undisputed title for two years, upon condition that the company, by the 1st day of January, 1882, would construct, complete, and equip a railroad from the Northern Pacific Junction, entering this state, and running therein down the St. Louis and Nemadji rivers to the bay of Superior, at or near the mouth of the Nemadji river, thence to Connor's Point, along or near the westerly side of said bay, with a depot and convenient connec-

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tions with docks and piers. The lands were conveyed by the county in pursuance of this agreement, and it is said that the transaction was, in effect, but a donation by the county of its property to the company, to secure the building of the branch of the railroad designated; and the question is, Could the county board of supervisors of the county dispose of the property of the county in this way by donating it to the railroad company? There is no pretense that it was in the nature of a subscription to the stock of the company. In the case of *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167, this court held that the power of taxation could not be exerted to raise money for the purpose of donating it to a railroad company, even when the legislature authorized it. In that case the county authorities were restrained from issuing negotiable securities, which created a county debt to be paid by taxation, though the court had, upon the strength of adjudications elsewhere, sustained the validity of municipal subscriptions to the stock of railroad corporations. But such subscriptions were sustained solely on the ground that their validity had been affirmed by many of the highest and most respectable courts in the land, and such vast pecuniary interests had become involved and were dependent upon these decisions that this court felt bound to follow them, while regarding as unsound the principle which they laid down. And while the distinction between a stock subscription and the donation or other appropriation of public money or corporate property to a railroad corporation is not very distinct and obvious, yet we are unwilling to extend a bad rule of law a particle beyond where the courts had carried it, and shall therefore adhere to the doctrine of the *Whiting Case.* Besides, that case has been fully approved in subsequent cases in this court. *Phillips v. Albany*, 28 Wis. 340; *Rogan v. Watertown*, 30 Wis. 260; *Bound v. W. C. R. Co.* 45 Wis. 543. There is nothing to distinguish this case or to take it out

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of the decision in the *Whiting Case;* for if the county could not donate money or securities to a railroad corporation, it could not give it its lands, which are the property of the county.

It was suggested by the eminent counsel for the railroad company that the federal supreme court had laid down a different rule, and had, in effect, held that in principle there was no difference between a subscription to stock of a railroad company, paying such subscription in money or bonds, and donating such money or bonds to the company; and that to avoid conflict in the opinions of this and that court, and the evil consequences which may result from it, this court should recede from the doctrine laid down in the *Whiting Case.* We fully appreciate the inconvenience which may arise from the want of harmony in the views adopted by the court of this state and the federal courts on this subject, but we are unwilling to change the rule established in the *Whiting Case.* It is a matter of regret that courts have sustained municipal subscriptions to the stock of railroad corporations, for it seems like a perversion of the object for which municipal governments are established, and the practice has often led to great mischief and oppression. But we can go no further than we have in sanctioning a bad principle. Whether or not there is solid ground for the distinction between the case of donating money or property to a railroad company, and subscribing to its stock and paying in money or bonds, the distinction has been made, and we feel bound to abide by it.

In this case, the county, at the time of making the donation and the execution of the deed in question, had no authority from the legislature thus to dispose of its property; but it is claimed this defect was cured by ch. 150, Laws of 1883. That act does attempt to validate the conveyance made by the county to the railroad corporation, and confirm the title in the grantee. But if the legislature could

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not authorize the county in the first instance to donate its lands to the railroad company, it could not cure or make valid such donation after it had been made. A curative statute must be confined to the cases where the legislature might previously have authorized the act. Where the defect is in the nature of a mere irregularity in the proceedings, it may be cured. "If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Cooley, Const. Lim. (5th ed.), 458 *et seq.* It is clear that the principle laid down by the learned author above does not reach this case; for, by the rule of the *Whiting* decision, it was beyond the power of the legislature to authorize the county board to donate its money or property to a railroad company, and of course it could not, by a subsequent act, cure a thing which it could not originally authorize to be done. This proposition is so obviously sound as to require no argument to support it.

If the deed from the county was void, still the plaintiff would have the right to have the court so adjudge, for the purpose of quieting the title. Sec. 3186, R. S., secures to him that relief.

It follows from these views that the order of the circuit court must be affirmed, and the cause remanded for further proceedings.

By the Court.—It is so ordered.

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FRENCH, Appellant, vs. FERGUSON and others, Respondents.

May 3 — May 20, 1890.

Justices' courts: Recess or adjournment? Jurisdiction: Judgment against defendant not served.

1. A recess taken by a justice's court at 2 o'clock P. M. until 10 o'clock A. M. of the following day, on account of the illness of the justice, is not an "adjournment" within the meaning of subd. 5, sec. 3574, R. S., and jurisdiction is not lost by the failure to enter in the docket the place to which such recess is taken.
2. A judgment by default against a defendant who was not served with process and did not appear is a nullity and does not affect the jurisdiction as to the other defendants.

APPEAL from the Circuit Court for *Ashland* County.

The plaintiff brought his action before a justice of the peace, against the defendants, to recover money paid for their use. The summons was not served on the defendant Willes. The remaining six defendants appeared before the justice December 7, 1887, and went to trial. After the plaintiff had put in his proofs, and the court had overruled a motion by defendants for a nonsuit, the following proceedings were had, as appears by the docket entries made by the justice: "It being night, the court took a recess until 2 o'clock P. M., December 8, 1887. December 8, 1887, at 2 o'clock P. M., parties appeared by counsel,— plaintiff and defendant. The court, being sick, by consent of parties took a recess until 10 o'clock A. M., December 9, 1887. December 9, 1887, 10 o'clock A. M., plaintiff appeared by counsel. After waiting one hour, and none of the defendants appearing by counsel or otherwise, the court, being satisfied from the evidence, determines and adjudges that the plaintiff, *C. E. French*, have judgment, etc., which judgment is entered in the usual form." The judgment is against all the defendants except Willes. The return shows

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that these docket entries were made at the several times such proceedings were had.

All the defendants against whom judgment was so rendered, except W. G. French, joined in suing out a writ of *certiorari* to remove such proceedings and judgment into the circuit court for review. The circuit court reversed the judgment of the justice, and the plaintiff appeals to this court from the judgment of reversal.

For the appellant the cause was submitted on the briefs of *John F. Dufur.*

For the respondents there was a brief by *Miles & Shea*, and oral argument by *W. F. Shea.*

LYON, J. It is understood that the circuit court reversed the judgment of the justice solely on the ground that the latter lost jurisdiction of the case by his failure to enter in his docket on December 8, 1887, the place to which the recess was taken. Sec. 3574, R. S., requires the justice to enter in his docket "every adjournment, stating at whose request and to what time and place." (Subd. 5.) It was held in *Brahmstead v. Ward*, 44 Wis. 591, and in several earlier cases there cited, that the place to which the cause is adjourned must appear from the docket entries made by the justice, or he loses jurisdiction. Such is the law of this state. The question is, therefore, Does the same rule apply where, as here, the docket entry is not that the cause was adjourned, but that a recess was taken by the court?

It is argued that there is no difference between an adjournment and a recess. It is doubtless true that an adjournment includes a recess, because it suspends for the time being the proceedings in the cause. But we think a recess is not necessarily an "adjournment," within the meaning of the latter term as used in the statute. Webster says that the word *adjourn*, both in England and this country, is applied to all cases in which public bodies separate for a brief

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period with a view to meet again. As applied to a justice's court, it signifies, we think, not only that the justice ceases to exercise his functions in the particular case for the time being, but that he and the parties, witnesses, jurors, and officers in attendance, separate from the place of trial, so that there remains no court at such place. If that result is accomplished, it is an adjournment, no matter by what name the justice designates the proceeding in his docket. If that result is not accomplished, it is not an adjournment, but a mere suspension of the proceedings in the cause for a time.

It seems to us that the result indicated as essential to constitute an adjournment was not accomplished by the proceeding of December 8th, as entered in the docket. True, the trial of the cause was thereby suspended until the next day, just as it would have been for a shorter period had a recess been taken for an hour to enable the justice to get his dinner. We suppose no one will claim that such a suspension of the trial is an adjournment, even though the justice may have entered in his docket that the cause was adjourned for one hour for that purpose. In contemplation of law, there would have been a court in existence at the place of trial during the dinner hour, although its functions were temporarily suspended. So in the present case there is nothing to show that the court was terminated, or even that the justice left the place of trial until the cause was finally disposed of on December 9th. The record only shows that, by reason of the illness of the justice, he suspended proceedings in the case until the next day at a certain hour. Had he done so for the same cause for one hour or two hours, it would not have been an adjournment, under any reasonable interpretation of the statute. How can it affect the principle that, owing either to the lateness of the hour, or the severity of his illness, or both, he suspended the proceedings a few hours longer?

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In either case, we conclude it was no adjournment, for the court was not thereby necessarily dissolved or terminated.

The rule of the cases above referred to is a harsh one, and should not be extended to a case not clearly within it. In our opinion, this case is not clearly within the rule, but is fairly distinguishable from the cases in which it has been applied. We hold, therefore, that the suspension of the proceedings from December 8th to December 9th, for the reason and under the circumstances stated in the docket entry, was not an adjournment of the cause, and hence the justice did not lose jurisdiction thereof because he failed to enter the place at which the trial would be resumed.

It appears by the docket entries that the defendant Willes was not served with process, and did not appear in the action, and that on the return day of the summons the justice rendered judgment against him by default in favor of the plaintiff. It is claimed that the rendition of such judgment terminated the jurisdiction of the justice as to the other defendants. The point is not well taken. The justice had no jurisdiction to render such judgment, and the same is a nullity, and cannot possibly affect his jurisdiction to proceed in the action against the other defendants.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded with directions to that court to affirm the judgment of the justice.

McLennan, Appellant, vs. Prentice, Respondent.

May 3 — May 20, 1890.

Deed: Breach of covenants of warranty: Evidence: Damages.

In an action for the breach of the covenants in a warranty deed it appeared that the grantor did not have actual possession of the premises before or at the time the deed was executed, that he had never

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delivered possession thereof to the grantee, and that the latter had never acquired possession under his deed. *Held*, that the burden of proof was upon the grantor to show that he was seised of an estate in fee at the time of the execution of the deed, and in the absence of such proof the grantee (who had tendered a reconveyance) was entitled to a rescission of the contract and to recover the purchase price paid, with interest from the date of the deed.

APPEAL from the Circuit Court for *Ashland* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

In the complaint of the appellant, the plaintiff in the court below, there were two causes of action stated at length. The first cause of action was, in substance, an action to recover for a breach of the covenants in a deed of the defendant, by which the defendant undertook to convey to the plaintiff lots 1, 2, 3, 4, 5, and 6, in block 23, in the city of Ashland, for a consideration mentioned in said deed of $6,000. In this cause of action the plaintiff alleges that the said deed contained the following covenants: "(1) That the defendant was lawfully seised of said block 23 and every portion thereof; (2) that the defendant has good right to convey said block and every part thereof; (3) the defendant guaranties the grantee [the plaintiff], his heirs and assigns, the quiet possession of said block and every portion thereof; (4) that the said deed contained a covenant by the grantor, his heirs and personal representatives, that said block 23 was free and clear from all incumbrances, and that the grantor, his heirs and personal representatives, will forever warrant and defend the title and possession thereof in the grantee, his heirs and assigns, against all claims whatever."

The complaint alleges in proper form breaches of all the covenants in said deed. In the first cause of action it is also stated that in payment of a part of the $6,000, the purchase price mentioned in said deed, the plaintiff gave his promissory notes for the sum of $2,500, and, as security

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for the payment of said sum, he executed a mortgage to the defendant upon said block 23. The complaint also alleges that the plaintiff has never been in possession of said block 23 or any part thereof; that he has not conveyed the same or any part thereof by deed or otherwise, nor in any way incumbered the same, except by the mortgage to secure the payment of said $2,500, part of the purchase money; and that before bringing this action plaintiff tendered to the defendant a deed reconveying said block 23 to the defendant, and demanded from him the surrender of his notes for said $2,500, and the payment to him of the sum of $3,500, with the lawful interest thereon, that being the sum paid by the plaintiff to the defendant as a part of the purchase price for said block.

The second cause of action alleges that the defendant was guilty of fraudulent representations in making the contract of sale of said block to the plaintiff, and asks relief on that ground. In the view we have taken of the case on this appeal, it is unnecessary to set up the facts alleged in this second cause of action. The defendant in his answer alleges, among other things, "that at the time of said bargain and sale, and for more than ten years prior thereto, the defendant was the owner in fee and entitled to the possession of all the land contained in said block 23, and all the riparian rights and shore privileges connected therewith, and duly conveyed the same and all thereof to the plaintiff by said warranty deed of April 2, 1887, as aforesaid, and by the delivery of said deed duly delivered to the said plaintiff the possession and all the rights of possession and seisin in, to, and of said block 23 and all thereof as aforesaid."

On the trial in the court below, the circuit judge made the following findings of fact and conclusions of law, viz.: "(1) That on the 2d day of April, 1887, at Ashland, Wis., defendant sold to the plaintiff, for the sum of $6,000, all of

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block twenty-three (23) of Ellis' division of Ashland, according to the recorded plat thereof, in the county of Ashland, state of Wisconsin, and duly executed, signed, sealed, and acknowledged, and delivered to the plaintiff as grantee therein, a warranty deed in statutory form of all of the above-described premises; (2) that said *Frederick Prentice* was, on the 2d day of April, 1887, the owner in fee of said premises, subject to a mortgage of Edwin Ellis for a portion of the purchase price thereof; (3) that prior to the commencement of this action the said defendant paid to said Ellis the full amount due on account of said mortgage, and then and there became the owner in fee simple of the premises, free and clear of all liens and incumbrances; (4) that at the time of the sale of said premises by the defendant to the plaintiff, the said defendant made no false and fraudulent representations in regard to the title to said premises, or to the quantity of land contained therein; (5) that there has been no breach of covenants contained in the defendant's said deed to the plaintiff. And as a conclusion of law the court finds that the defendant is entitled to a judgment of no cause of action, and of a dismissal of the complaint, together with the costs herein, and the clerk is hereby directed to enter judgment accordingly."

To the second, third, fourth, and fifth findings of fact the plaintiff duly excepted. He also excepted to the conclusion of law.

For the appellant there was a brief by *T. L. Kennan* and *C. T. Kennan*, and oral argument by *T. L. Kennan*.

For the respondent there was a brief by *Tomkins, Merrill & Smith*, and oral argument by *W. M. Tomkins*.

TAYLOR, J. As stated above, we shall not consider upon this appeal whether the defendant made any false representions in regard to the title or quantity of land contained in said block 23.

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After reading all the evidence contained in the record, it seems to us very clear that the learned judge erred in finding that the defendant, at the time he made the conveyance of block 23 to the plaintiff, was the owner of said block in fee; and, *second*, in finding that there was no breach of the covenants contained in defendant's deed to the plaintiff. On the trial of the action there was no evidence introduced on the part of either party showing, or tending to show, that on the 2d day of April, 1887, the defendant had any title, in fee or otherwise, to any part of said block 23. The evidence, on the other hand, shows that the defendant was not in the actual possession of said block or any part thereof either before or at the time of the execution and delivery of said deed; that he did not deliver the actual possession thereof to the plaintiff; and that the plaintiff never took possession of said block or any part thereof under his said deed. The evidence also shows that, as to that part of said block which was not covered by the waters of the lake, the Wisconsin Central Railroad Company had the actual possession of nearly the whole thereof.

The mistake made by the learned circuit judge upon the trial was in holding that in this action for a rescission of the contract of sale for a breach of the covenants of this deed the burden of proof was upon the plaintiff to show that the defendant had no title in fact, and that, in the absence of any proof on the subject, the presumption was that the defendant had title. Under the complaint, the plaintiff had the right to recover upon a breach of the covenant of seisin, and on the covenant of a right to convey, upon proof of the execution and delivery of the deed and payment of the purchase money, and that the actual possession of the property had never been taken by the plaintiff under his deed. The rule as to the burden of proof in such case was established by this court in *Mecklem v. Blake*, 16 Wis. 102, and was followed in *Beckmann v. Henn*, 17 Wis. 412, and *Noonan v.*

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Ilsley, 21 Wis. 144. This rule has never been questioned in this court, and it was referred to with approval in *Ayres v. C. & N. W. R. Co.* 71 Wis. 382. It is unnecessary to quote other authorities in support of the rule. The defendant having admitted the making of the deed, and the deed being in evidence showing the covenants, and the evidence in this case showing affirmatively that no possession of the granted premises was ever given by the grantor to the grantee, and that no possession had ever been in fact taken by such grantee under his deed, the burden of showing that the grantor was seised of an estate in fee at the time of the making and delivery of the deed was upon the grantor. What evidence there was produced on the part of the plaintiff shows *prima facie* that the legal title to two of the lots was not in the defendant at the time of the execution and delivery of the deed. There was no evidence given as to who held the title to lots 2, 3, 4, and 5. In this state of the evidence, the plaintiff was clearly entitled to have the contract of sale rescinded for the breach of the covenant of seisin, etc.

The question as to what amount the plaintiff is entitled to recover upon the breach of the covenant of seisin, when the grantee was not put in the actual possession of the property conveyed, and when he has never in fact taken such possession under his deed, has also been settled by this court in *Nichol v. Alexander*, 28 Wis. 118, and *McInnis v. Lyman*, 62 Wis. 191. In the last case Justice LYON says: "In *Nichol v. Alexander*, 28 Wis. 118, it was held that if a grantor, by full covenant deed of warranty, assumes to convey unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee which entitles him to the same remedies that he would be entitled to had he been turned out of the actual possession of the land by legal process. It was also there held that if, in such a case, the grantor subsequently obtains a good title to the

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land, while he would be estopped to deny the title of his grantee, yet he cannot compel the latter, after his eviction by title paramount, to accept such after-acquired title in satisfaction of the covenants in his deed, or in mitigation of damages for a breach thereof. As to constructive eviction, see Rawle, Cov. (2d ed.), 268, and cases cited in note." There is nothing in the language of the court in the case cited in conflict with the decision of this court in the case of *Mecklem v. Blake*, 22 Wis. 495. It that case it was held by this court that a grantee in the undisturbed actual possession of the property conveyed to him by a warranty deed from his grantor, and when such actual possession is taken under such deed, can recover only nominal damages for a breach of the covenant of seisin. In that case the learned Chief Justice Dixon says: "This doctrine is furthermore supported by the decisions of this and other courts, that where a deed is made and accepted, and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase money, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect of title;" citing *Taft v. Kessel*, 16 Wis. 273; *Horton v. Arnold*, 18 Wis. 212; *Ludlow v. Gilman*, 18 Wis. 552; *Hall v. Gale*, 14 Wis. 54. He further says: "Nothing could be more inconsistent than to hold that the purchaser in possession cannot resist an action to compel payment of the purchase money, and yet that he may turn around and immediately recover it back by a suit upon the covenant of seisin." The learned chief justice also says in his opinion: "If he [the grantee] desired to rescind for want of title, and to recover back the purchase money paid and interest, he should have tendered Blake a reconveyance and the possession, and then he could have maintained his action. *Taft v. Kessel, supra.*" This is what the plaintiff in the case at bar did before commencing his action, as will be seen from the statement

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above made as to the facts set out in his complaint. Whether he was under any obligation to make such tender of a reconveyance before commencing his action in a case like the one at bar, when there never had been any possession delivered by the grantor or taken by the grantee under his deed, in order to entitle himself to recover the purchase price, is a question which need not be determined in this case. The tender of the deed reconveying the property is admitted by the defendant in his answer.

Upon the evidence in the case, the plaintiff is entitled to a rescission of the contract of sale, and to recover the purchase price, with interest from the date of the deed, unless the defendant shall deliver up and cancel the note and mortgage of the plaintiff for the $2,500; and, in case of such delivery and cancellation, the plaintiff will be entitled to judgment for the sum of $3,500, with interest from the date of said deed.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to the circuit court to enter judgment in accordance with this opinion; but the circuit court may, in its discretion, on the application of the defendant, for cause shown and upon such terms as shall be just, grant a new trial upon all the issues in the case.

COLE, Appellant, vs. MITCHELL and others, Respondents.

May 3 — May 20, 1890.

Jurisdiction: Notice of motion: Action on judgment.

1. An order granting leave to bring an action upon a judgment is not void for want of jurisdiction although notice of the motion therefor was served less than eight days before the order was made.
2. When the notice in such case states the amount of the judgment unpaid, the want of service of any affidavit or other paper on which the motion was founded is not a jurisdictional defect.

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APPEAL from the Circuit Court for *Juneau* County.

On May 2, 1889, the following notice was served upon the respondents: "[Title of cause.] The defendants in the above-entitled action will please take notice that application will be made to said court, at the court house in the city of Madison, Dane county, Wisconsin, on the 6th day of May, 1889, at 10 o'clock in the forenoon of that day, for leave to bring an action on the judgment recovered therein on the 7th day of May, 1869, on which judgment there is now due and unpaid the sum of four hundred ($400) dollars. Said judgment was recovered in an action for trespass, and the defendants Asa Douglass, George Ball, Leonhard Ryans, Morris Lancaster, and John Crowley have been released on the payment of their proportionate share of said judgment. *Dated May 30th, A. D. 1890.* [Signed] WINSOR & WINSOR, Attorneys for plaintiff."

No affidavits or other papers were served with the notice, but upon the hearing of the motion the plaintiff presented an affidavit setting out more fully the facts stated in the notice. The respondents appeared specially for the purpose of objecting to the jurisdiction of the court to grant the motion. The motion was granted, but afterwards, on July 9, 1889, the order granting the same was vacated by the court, on the ground that it had no power or authority to make such order. From the order of July 9, vacating the order of May 6, the plaintiff appeals.

For the appellant there was a brief by *Winsor & Winsor*, and oral argument by *Mr. F. Winsor.*

For the respondents there was a brief by *Smith & Buell*, and oral argument by *R. B. Smith.* They contended (1) that the failure to give the eight days notice of motion deprived the court of any power to grant the plaintiff's motion. R. S. secs. 2817, 2916; Circuit Court Rule XI, sec. 1; *Bush v. Geisey*, 16 Oreg. 267; *Wilde v. Wilde*, 2 Nev. 306; *Rogers v. McElhone*, 12 Abb. Pr. 292; *Merritt v. Slocum*,

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6 How. Pr. 350; *Androvette v. Bowne*, 4 Abb. Pr. 440; *Gray v. Nunan*, 63 Cal. 220; *Floyd v. Black*, 6 Litt. (Ky.), 11. (2) The failure to serve the moving papers with the notice is equally fatal. R. S. sec. 2916; Circuit Court Rule XI, sec. 2; *Corwith v. State Bank*, 8 Wis. 376; *Cartright v. Belmont*, 58 id. 370; *Hungerford v. Cushing*, 8 id. 320.[1]

ORTON, J. The judgment in this case was rendered May 7, 1869. On May 2, 1889, notice was served on the defendants that the plaintiff would make application to the court on May 6, 1889, at 10 o'clock in the forenoon, for leave to bring an action on said judgment. On that day the defendants appeared specially for the purpose of objecting to the jurisdiction and authority of the court to grant said motion. The court, however, sustained said motion, and granted such leave. The statute under which this motion was made is as follows: "No action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties, without leave of the court for a good cause shown, on notice to the adverse party." Sec. 2916, R. S. On the 9th day of July, 1889, the court, on motion of the defendants, they having appeared specially to make the same, ordered that said order granting leave of May 6, 1889, be vacated and set aside be-

[1] Sec. 2817, R. S., provides that "when a notice of motion is necessary, unless the time be fixed by statutes or the rules of court, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time." Circuit Court Rule XI, sec. 1, provides that "all motions shall be brought to hearing before the court or a judge on a notice or order to show cause. Notice of the motion shall be served on the attorney of the adverse party at least eight days before the same shall be heard," etc. Sec. 2 provides that "copies of all records, affidavits, and other papers upon which a motion or order to show cause is founded, except such as have been previously filed or served in the same action or proceeding, shall be served with the notice thereof or the order to show cause, and shall be plainly referred to therein."—REP.

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cause the court had no power or authority to grant the same. This last order is the subject of this appeal. It will be seen that the order appealed from stands alone upon the want of jurisdiction of the court to grant the former order of May 6, 1889, so that the only question before this court on this appeal is, Had the court jurisdiction to make said order?

It is contended by the learned counsel of the respondent that the court had no jurisdiction to grant said order because (1) there was not eight days' notice of the motion, and (2) because no affidavit or other paper on which it was based was served on the defendants, but only the notice itself. It seems that when the notice was served there were only five days remaining before the judgment would be barred by the twenty years statute of limitations, so that this short notice was then a necessity if any previous leave to sue upon it was to be obtained at all. Perhaps there was no excuse for such laches, but such was the fact. We shall take it for granted that this application for leave was a regular motion, and that eight days' notice was required. The defendants appeared, however, not to ask for more time or longer notice, or for any postponement, or that the notice be set aside, or to claim that there was nothing due upon the judgment and therefore no merit in the application, but "specially for the purpose of objecting to the jurisdiction and authority of said court to grant said motion, and for no other purpose whatever." It does not appear that it was not convenient for the defendants to meet the motion at that time, or that there was any reason for its not being heard and disposed of at that time, except the purely technical one that the notice was shorter than the statute and rules require. There were therefore no merits in the motion to vacate the order. But that is not the question to be decided, and I speak of it only to show the nature of the proceeding, as it may affect the real question

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of the jurisdiction of the court to make the order at that time. The order was made on this short notice, and the question is, Was it void?

The defendants had actual notice of the motion and the time of hearing it. This gave the court jurisdiction of their persons, and they were present when the order was made. The learned counsel of the respondents have cited no authorities which show that such an order is void for want of jurisdiction. It is at most merely irregular. It is sufficient that the defendants had notice of it, and were apprised of what was going on against them, and were afforded an opportunity to defend against it. This gave the court jurisdiction over them. *In re Empire City Bank*, 18 N. Y. 200; *Rockwell v. Nearing*, 35 N. Y. 302. "It matters not that it was difficult or inconvenient to appear, if it was not impracticable." *Flint R. S. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248, and note. The court has jurisdiction to render judgment for default before the time of answering has expired. The judgment is not void, but merely irregular. *Salter v. Hilgen*, 40 Wis. 363. Judgment by the clerk without notice is not void, but irregular. *Egan v. Sengpiel*, 46 Wis. 704; *Schobacher v. Germantown F. M. Ins. Co.* 59 Wis. 86. If judgments are not void when rendered before the time of answering has expired, or without notice when notice is required by law, it is quite certain that an order is not void made on too short a notice. The following cases are cited by the learned counsel of the appellant, in which it is held that an order granting leave to sue (and most of the cases are like this) may be obtained after suit is brought *nunc pro tunc*. *Angel v. Smith*, 9 Ves. 335; *Chautauque Co. Bank v. Risley*, 19 N. Y. 376; *Finch v. Carpenter*, 5 Abb. Pr. 225; *Burrough v. Hull*, Voorh. Code, 1855, sec. 71, note *d*; *Church v. Van Buren*, 55 How. 489; *McKernan v. Robinson*, 84 N. Y. 105; *Lane v. Salter*, 4 Rob. (N. Y.), 239. If an order is void for want of jurisdiction, which

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grants leave to sue without a sufficiently long notice, then it is incurable by an order *nunc pro tunc* or in any other way. But the cases in this court, as well as common reason, are conclusive of the question. The order may have been irregular, but was not void, and therefore the circuit court ought not to have vacated and set it aside for that reason.

2. The want of service of any affidavit or other papers on which the motion was founded, with the notice, was clearly not jurisdictional. It was most obviously a mere irregularity. The notice itself states the amount of the judgment unpaid, and that was the material fact.

There being no question about the power, authority, or jurisdiction of the court to make the order on such short notice, it was just and proper for the court to do so, in order to save the judgment from the bar of the statute. It was an irregularity that did no harm or injustice to the defendants, and was purely technical.

By the Court.— The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

MARLET, Respondent, vs. HINMAN, Appellant.

May 3 — May 20, 1890.

Chattel mortgages: Filing: Loss from files: Innocent purchaser.

1. It was stipulated that the mortgagor, at the request of the mortgagee, delivered a chattel mortgage to the proper town clerk, "who took the same into his possession and filed it as of that day," making the entries required by subd. 10, sec. 832, R. S. *Held*, that the mortgage was duly filed, within the meaning of sec. 2314, R. S.
2. A chattel mortgage which has been duly filed is valid as against a subsequent *bona fide* purchaser of the property, although prior to his purchase the mortgage has disappeared from the files through the negligence or misconduct of the town clerk.

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APPEAL from the Circuit Court for *St. Croix* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an action of replevin brought by the plaintiff, as chattel mortgagee, to recover the possession of a pair of steers. The facts are undisputed, and to the effect that October 22, 1887, John F. Brewer and wife, in the absence of the plaintiff but at his request, executed a chattel mortgage on the steers in question to the plaintiff, to secure the sum of $61.67; that said Brewer, at the plaintiff's request, thereupon took the said mortgage to the proper town clerk's office, and handed the same to said town clerk, who took the same into his possession, and filed it as of that day, making the following entry in his indexed Book of Chattel Mortgages, to wit: "John F. Brewer to *John Marlet*, October 24, 1887. $61.67. Dated October 22, 1887; due October 22, 1888." November 1, 1887, said Brewer sold and delivered said steers to one Blakely for a full and valuable consideration, who then and there purchased the same in good faith and without notice of the existence of said mortgage, and upon the representations of said Brewer that the same were free and clear of all liens, and that there was no chattel mortgage thereon. The next day said Blakely, having heard that there was a chattel mortgage on the steers, given by Brewer, at once went to said town clerk's office, and in connection with the son of said clerk made a thorough and diligent search among the files and papers of said office and all the chattel mortgage files therein, but no such mortgage or copy thereof could be found in said office. None such, nor any copy thereof, was on file in said office, and neither said mortgage nor any copy thereof has since been on file in said office. November 30, 1887, said Blakely, for a full and valuable consideration, sold and delivered said steers to one Pettit, who bought the same in good faith, and without any notice of the existence of any such mortgage,

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and relying upon the representations of said Blakely at the time of sale that there was no mortgage upon said steers. Thereupon said Pettit heard there was a chattel mortgage on the steers, and at once went to said town clerk's office, and was then and there informed by said clerk that there was no such mortgage nor any copy thereof on file in his office. December 15, 1887, said Pettit, for a full and valuable consideration, sold said steers to the defendant, who then and there purchased the same in good faith, and without any notice of the existence of any such mortgage, and relying upon information given him by said Pettit, at the time of such purchase, to the effect that the steers were free from any and all mortgage liens, and that he had been informed by the said town clerk that there was no mortgage thereon on file in his office.

Said mortgage was never taken from said files or town clerk's office by the plaintiff, or with his knowledge or consent, and he did not know that the same had been taken therefrom until after the defendant had so purchased said steers. During the time mentioned the said Blakely and Pettit were each and both financially irresponsible and insolvent. Before the commencement of this action the plaintiff demanded said steers of the defendant, who refused to give them up. Their value at the time of such demand was $60. The debt on which said mortgage was given has never been paid nor satisfied. The books in the town clerk's office do not show that the mortgage was ever canceled. The mortgage filed therein was the original and not a copy.

Upon the trial of the action a jury was waived, and the facts in the case, substantially as stated, were stipulated by the parties; and the court thereupon found the facts as stated in said stipulation, and, as conclusions of law, that the plaintiff should have judgment for the return of the steers, or for the value thereof in case a return could not

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be had, with six cents damages for the detention thereof, with costs. From the judgment entered accordingly upon said findings in favor of the plaintiff, the defendant appeals.

The cause was submitted for the appellant on the brief of *R. H. Start*, and for the respondent on that of *J. R. Mathews*.

To the point that after a mortgage has been permanently removed from the town clerk's office it is no longer effectual to hold the property as against one who purchases it in good faith, for a valuable consideration, and with notice that there is no mortgage against it in the clerk's office, counsel for the appellant cited *Sternberger v. McSween*, 14 S. C. 36; *Woodruff v. Phillips*, 10 Mich. 500; *Swift v. Hall*, 23 Wis. 532; *Ward v. Watson*, 24 Neb. 592.

CASSODAY, J. "No mortgage of personal property shall be valid against any other person than the parties thereto unless the possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage or a copy thereof be filed as provided in the next section, except when otherwise directed in these statutes." Sec. 2313, R. S. The exceptions referred to have no application here. The next section thus mentioned provides that "every mortgage of personal property, or a copy thereof, may be filed in the office of the clerk of the town . . . where the mortgagor resides. . . . Such clerk shall indorse on such mortgage or copy the time of receiving the same, and keep the same in his office for the inspection of all persons. Such clerk shall also make the entries as required in subdivision 10 in section 832. Mortgages so filed shall be as valid and binding upon all persons as if the property thereby mortgaged had been, immediately upon the execution of such mortgage, delivered to, and the possession thereof retained by, the mortgagee." Sec. 2314, R. S.

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The entries which sec. 832 thus requires the town clerk to make were "to file, when presented, all chattel mortgages and affidavits relating thereto, and to enter at the time of filing, in a book properly ruled and kept therefor, the names of all the parties, arranging mortgagors alphabetically, the date of each mortgage, and the date of filing the same and of each affidavit relating thereto." Subd. 10.

Was the mortgage in question "filed," within the meaning of the statutes quoted? It will appear from the foregoing statement that the "entries" which the town clerk was thus required to make in his index book were in fact made by him at the time the mortgage was delivered to and left with him. This court has gone so far as to hold, however, that the requirement of such entries to be made is merely directory, and not essential to the validity of such filing. *Smith v. Waggoner*, 50 Wis. 155. The statutes cited make it the duty of the clerk "to file" the mortgage or copy when presented, and to "indorse" thereon "the time of receiving the same." In the case cited, it is said by Mr. Justice ORTON, that "these provisions are easily understood, and make the filing of the mortgage and the indorsement thereof the principal things to be done as affecting the validity of the mortgage, and notice to all persons interested." 50 Wis. 160. In legal contemplation, the filing of the mortgage was complete when delivered to, received by, and left with the town clerk for that purpose. *Ibid.; Gorham v. Summers*, 25 Minn. 81; *People v. Bristol*, 35 Mich. 28; *Keating v. Retan*, 45 N. W. Rep. 141. The requirement of sec. 832, R. S., quoted, making it the duty of the town clerk "to file" such mortgage when presented, is nothing more than to receive the same and make the indorsement thereon required by sec. 2314, quoted. The stipulation to the effect that when the mortgage was handed to the town clerk, he "took the same into his possession, and *filed* it as of that day," clearly means that he took the mortgage into

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his official custody, and indorsed thereon "the time of receiving the same," within the meaning of the section last cited. True, it was so delivered to the town clerk by the mortgagor, but, since he did so at the request and as the agent of the plaintiff, though in his absence, the filing was just as effectual as though such delivery had been made by the mortgagee himself. *Sargeant v. Solberg*, 22 Wis. 136; *Harrington v. Brittan*, 23 Wis. 541. But the mere fact that the mortgagor was the agent of the mortgagee in thus filing the mortgage, gave him no implied authority to conceal the same in the office of the town clerk, and much less to remove the same from the files or the office. *Case v. Jewett*, 13 Wis. 498. In the case at bar there is no evidence of any such concealment or removal by the mortgagor. There is nothing in the record accounting or attempting to account for the absence of the mortgage from the files or the office. It does appear, however, that it was not taken therefrom by the plaintiff nor with his knowledge or consent, and that he did not know that the same had been taken therefrom until after the purchase of the steers by the defendant. It follows from what has been said that the mortgage was duly filed.

The mortgage being "so filed," the statute quoted expressly declares that it "shall be *as valid* and binding upon *all persons* as if the property thereby mortgaged had been, immediately upon the execution of such mortgage, delivered to, and the possession thereof retained by, the mortgagee." Sec. 2314. The question recurs whether the plaintiff is to be deprived of these statutory provisions in his favor, without any fault, negligence, or privity of his own, and solely by reason of the negligence or misconduct of the clerk. "It is the settled law of this state that the mortgagee of chattels has the legal title to the property before the debt is due, and that he may take immediate possession thereof, unless by express stipulation the mortgagor is permitted to

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retain possession." *Hill v. Merriman*, 72 Wis. 486. Such right of the mortgagee was fully protected by such filing of the mortgage, even as against subsequent purchasers for value in good faith. The possession of personal property is at most only *prima facie* evidence of title. A *bona fide* purchaser of such property from one in possession cannot hold the same as against the true owner. Had the mortgage in question remained on file, and the mortgagor had removed to some other town, or even some other state, and there, during the life of the mortgage, sold the steers to a *bona fide* purchaser, yet there is plenty of authority for holding that such purchaser would not thereby have acquired title to the same as against the mortgagee. *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62, and numerous authorities cited in the note; *Keenan v. Stimson*, 32 Minn. 377; *Norris v. Sowles*, 57 Vt. 360. The loss in such supposed case would, under these authorities, fall upon the purchaser. Here there is much stronger reason for holding that it should fall upon the defendant as such purchaser, since he has his remedy against the clerk, by reason of whose misconduct or negligence the loss has been sustained. Secs. 830, 985, R. S.

By the Court.— The judgment of the circuit court is affirmed.

REID and others, Appellants, vs. MARTIN, Respondent.

May 3—May 20, 1890.

(1) Taxation of costs: Copies of pleadings. (2) Sheriff's fees: Presumption. (3) Appeal: Clerical error: Costs.

1. The engrossed copy of a pleading or paper in an action is for filing, and costs cannot be taxed for an additional copy for that purpose.
2. Where the sheriff's return shows service of a subpœna on several witnesses both within and without the county, it will be presumed,

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in the absence of a showing to the contrary, that his charges of mileage are only for travel within the county.

8. The correction in this court of a mere clerical error in a judgment, which would have been corrected in the court below had attention been there called to it, is not allowed to affect the question of costs on the appeal.

APPEAL from the Circuit Court for *Waukesha* County.

The defendant recovered judgment in the circuit court against the plaintiffs for $72.43 costs. At the time appointed for the taxation of costs by the clerk, counsel for plaintiffs appeared, and made formal objection to the sums charged in the bill presented for taxation for several items of service. These objections were to the items charging for engrossing and three copies of pleadings and other papers necessarily served in the case. The charges are for engrossing and for three copies,— one to file, one to keep, and one to serve. It is claimed that the engrossed copy is for filing, and hence but two other copies can properly be charged,— one to serve and one to keep. There are seven of these items, aggregating 25 folios. The bill also contains a charge of $6.85 for sheriff's fees for service of a subpœna and mileage. The only proof of such charge is the sheriff's return to the writ, which is as follows: "I hereby certify and return that I served the within subpœna on the within named persons, at the village of Waukesha, county of Waukesha, and city of Milwaukee, by reading the same to them personally, on the 20th day of June, A. D. 1889. Fees: service, $1.25; travel, $5.60,— total, $6.85."

The clerk overruled the objections, and taxed the costs as charged in the bill, but by mistake allowed $7.50 for such service and mileage, instead of $6.85, as charged. The plaintiffs, by proper procedure, obtained a review of such taxation by the circuit court. The court affirmed the clerk's taxation, and the sum so taxed was inserted in the judgment. The plaintiffs appeal from so much of the judgment

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as awards the defendant more than $64.63 costs. Hence the appeal covers $7.80, which is the amount of the items of costs to which plaintiffs thus objected, together with the sum thus allowed by mistake of the clerk.

For the appellants the cause was submitted on the brief of *Shepard & Shepard*, and for the respondent on that of *Ryan & Merton*.

To the point that if the sheriff serves process beyond his territorial jurisdiction he acts as a private person and his return must be made accordingly, counsel for the appellants cited *Thurston v. King*, 1 Abb. Pr. 126; *Morrell v. Kimball*, 4 id. 352; *Farmers' L. & T. Co. v. Dickson*, 9 id. 61.

LYON, J. 1. The defendant can only be allowed for necessary copies of the pleadings and other papers served in the case. The engrossed copy is for filing, and he can only be allowed, in addition thereto, for one copy to serve and one to keep,— three in all. The court allowed for the engrossed copy and three other copies,— four in all. The judgment must be reduced by deducting therefrom the fees for one copy of all such papers. These amount to three dollars. It was said in argument that the taxation was in accordance with the practice which prevails in the thirteenth circuit, but that a different practice prevails in some other circuits in the state. This is not a matter of discretion, and a practice which violates the statute cannot be upheld.

2. There is nothing in the record which shows any overcharge of sheriff's fees on the subpœna. The writ was directed to and served upon five persons. A portion, probably four of them, were served in the village of Waukesha, and the other in the city of Milwaukee. It is claimed on behalf of the plaintiffs that the sheriff is not entitled to fees for travel outside his own county, and, if he is so entitled, the

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service can be proved only by affidavit, the same as if made by a private citizen. These propositions are not raised by this record. The sheriff's official certificate is sufficient proof *prima facie* of services rendered in his county, and there is nothing in the record to show any charge for travel outside of it. The witnesses served in Waukesha village may have resided in remote corners of Waukesha county, and the sheriff may have necessarily traveled to their residences to make the service, and, failing to find them there, afterwards found and served them in said village. The statute entitles him to one mileage for the greatest distance actually traveled by him to make such service. S. & B. Ann. Stats. sec. 731. If, therefore, we restrict the allowance to travel in Waukesha county, still there is nothing in the record to show any overcharge of fees.

3. The sheriff's fees on the subpœna are $6.85. The clerk allowed them at $7.50. This was doubtless a mere clerical error, to which the attention of neither the clerk nor court was called. Had it been, the mistake would have been corrected at once. We will correct it. But for the reason just stated, it cannot be allowed to affect the question of costs of this appeal.

By the Court.—The portion of the judgment for costs appealed from, to wit, $7.80 thereof, is reversed as to $3.65, and affirmed as to the residue, without costs to either party, except the defendant must pay the clerk's fees in this court.

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HICKS, Appellant, vs. SMITH and another, Respondents.

May 20 — June 21, 1890.

Sale of timber to be cut and removed within a certain time.

The pine timber upon certain lands was conveyed to the plaintiff, with a stipulation that it should be cut and removed from the lands before a specified date. Afterwards, with knowledge of the plaintiff's rights, the defendants purchased the land. *Held*, that all timber cut down and severed from the soil by the plaintiff before the date specified became his personal property, which he might remove within a reasonable time after said date.

APPEAL from the Circuit Court for *Langlade* County.

Replevin for a quantity of pine logs which had been cut and removed from certain lands in township 35 north, range 12 east. The facts are stated in the opinion. The plaintiff appeals from a judgment in favor of the defendants.

For the appellant there was a brief by *Webster & Wheeler*, and oral argument by *W. H. Webster*.

For the respondents there was a brief by *Lynch & Latta*, and oral argument by *G. W. Latta*. To the point that under the contract of sale to him the plaintiff was entitled only to so much of the timber as he should cut *and remove* within the specified time, they cited *Rich v. Zeilsdorff*, 22 Wis. 544; *Strasson v. Montgomery*, 32 id. 52; *Martin v. Gilson*, 37 id. 360; *Golden v. Glock*, 57 id. 118.

ORTON, J. The facts are substantially as follows: On and prior to August 31, 1886, Fox & Weston were the owners of the land, and sold all the pine timber thereon to the plaintiff by the following instrument in writing, viz.: "[We], for and in consideration of the sum of one hundred dollars to us in hand paid, the receipt whereof is hereby acknowledged, do grant, bargain, and sell to *Asa Hicks*, of

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Shawano, all the pine timber on the northwest quarter of the northwest quarter, and the northeast quarter of the northwest quarter, of section 30, town 35, range 12 east; the said pine timber to be cut and removed from the above-described forties on or before January 1st, 1888. Witness our hands and seals (by W. J. Abrams, our attorney in fact) this 31st day of August, 1886. [Signed] A. J. Fox. [Seal.] A. Weston. [Seal.] By W. J. Abrams. [Seal.]" On the 25th day of November, 1887, the said Fox & Weston contracted to sell the land on which such pine timber was then standing to the defendant *C. H. Larzelere.* After that, and before the 1st day of January, 1888, the said plaintiff cut down and severed from the soil all or a large part of the pine trees or timber on said land. Some of them were sawed into logs, and the rest were marked off into log-lengths, and the log-mark of the plaintiff was placed on each log and log-length, but none of the same were removed from said land on or before said 1st day of January, 1888. After that date the defendants sawed the trees which had been so cut down and marked into log-lengths by the plaintiff, and removed all of them from said land, and converted the same to their own use. It was agreed on the trial that said logs so removed by the defendants were 165,432 feet.

The action is in replevin, and was tried by the court, a jury having been waived, and the court found the above facts, as also that on the 9th day of May, 1888, the said Fox & Weston gave to the plaintiff a bill of sale of said pine timber theretofore cut or removed from said land, and assigned to him all their interest in the same and their rights of action therefor, and that when the said *Larzelere* contracted to purchase said land as aforesaid he had been informed of the fact that the plaintiff had previously purchased the pine timber on said land from said Fox & Weston, and that he then claimed to own the same under such purchase. The court also found that the value of said pine timber so

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removed by the defendants was $11 per 1,000 feet, and the total value thereof was $1,819.75, and rendered judgment therefor in favor of the defendants.

The finding of the defendant's knowledge of the plaintiff's right to the timber before he purchased the land was amply sustained by the evidence. It seems that the value of the land consisted almost entirely of the pine timber on it, and when the defendant contracted to purchase it he evidently supposed that the plaintiff would be unable to remove said timber so cut and marked by him before said January 1, 1888, the day of forfeiture, then near at hand, and that he would probably obtain both the timber so cut and the benefit of the plaintiff's labor in cutting it. Whatever, therefore, the defendants' right may be at law, they have very little in equity.

There are only two material questions in this case, and they are both disposed of in the recent case of *Golden v. Glock*, 57 Wis. 118. The cases appear to be materially alike in principle and fact. In that case the deed was for all the timber on a certain quarter section of land, except the white oak, and there was a separate clause or stipulation in the instrument that the timber on the south half of the premises should be removed within one year, and the balance within two years. The timber was cut down and into stave bolts within the time limited, but none of it removed from the land. The purchaser of the land from the grantor claimed the stave bolts. The questions in both cases were—*first*, whether such stipulation is a condition or a covenant; and, *second*, whether the timber, having been severed from the soil and converted into personal property within the time limited, does not belong to the grantee in the deed. It was decided in that case that the stipulation was a condition of the grant, and that the legal effect of the instrument was to convey all of the trees and timber designated which should be removed within the

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time prescribed. So here it was clearly the intention of the parties that this stipulation should have the effect of such a condition. As to the second question, it was decided that the trees from which the bolts were manufactured, having thus been severed from the soil prior to the expiration of the time limited, and their character essentially changed by such manufacture, so that the product became personal property, they were in effect thereby removed from the premises within the meaning of the conditions in the deed, and hence that the plaintiff, even after the expiration of the two years, had an implied right or license to go upon the premises and take therefrom the stave bolts so manufactured.

The learned counsel of the respondents contend that the above case has no application to the last-above question, because in that case the trees were not only cut down but manufactured into stave bolts, while here they were only cut down and marked, or cut into logs, and not manufactured into anything, but lay where they fell. It is not made essential in that case that the trees should have been manufactured into anything after they were severed from the soil to make them personal property. It is a statement of the facts in that case merely, and the severance of the trees from the soil, by cutting them down, constitutes their conversion into personal property. They are no longer a part of the land, and are not real property, and therefore must be personal property. Manufacturing the timber, after it is cut down, into any form is no part of the act of its *severance* from the land. It is personal property because it is "severed from the soil." The sap can no longer go up into the tree from the soil, as some writers say.

Trees and grass growing upon land are alike a part of the land itself, and when cut down or severed from the land are alike personal property. *Wescott v. Delano*, 20 Wis. 514. Must grass not only be cut and severed from

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the land, but be manufactured into something else, to make it personal property? No more need the severed timber to be manufactured into some other form to make it such. BIGELOW, C. J., says in *Drake v. Wells*, 11 Allen, 141: "In these cases it appeared that the license had been acted on by the vendee, who had entered on the land and cut the timber which was the subject of the contract of sale, and had thereby acquired a title to the wood as personal property." That is precisely this case, only the severed trees here had passed into the similitude of logs, which, however, can make no real difference either way. In *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295, it is held that if a person had license to sever the trees from the soil, after they are severed they become his personal property, and that trees in such respect are the same as grass and other natural productions of the soil. In *Bank v. Crary*, 1 Barb. 542, it is held that growing trees, fruit, and grass, being parcel of the land, are within the statute of frauds, and until *severed* from the land, either actually or in contemplation of law, they cannot be conveyed by parol, but when severed from the soil they become chattels. The decisions are uniform that when growing trees are severed from the soil under a license they become personal property and belong to the licensee. Note to *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173. A tree is real property so long as it stands in its native soil; but when it is cut down it becomes subject to the laws of personal property. 1 Schouler, Pers. Prop. 4. Standing trees are a part of the realty, and can only pass by deed, but when severed may pass like any other chattels. 2 Schouler, Pers. Prop. 451. But the proposition would seem to be self-evident.

There is no real difference between this case and that of *Golden v. Glock*, 57 Wis. 118. It follows, therefore, that all the trees the plaintiff cut down and severed from the soil before the time limited in said deed became his personal

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property, which he had the right to remove within a reasonable time, even after the time fixed in the deed had expired. If anything more was required than a mere severance of the trees from the soil to make them the personal property of the plaintiff, he had indicated his intention of converting all of them into logs, by marking them into the proper length, and sawing many of them into logs, and placing his mark upon all of them, ready for removal as personal property. But I am unable to see how the *use* of them, after they are severed from the soil, could make the severance more complete, or make them personal property. The plaintiff had bought and paid for them, and cut them down when he had the right to do so, and treated them as his *movable* property. The deed of Fox & Weston to the defendant *Larzelere* in execution of the contract for the purchase of the land was not made until long after the commencement of the suit. At that time it could not have passed the title of those logs if they had remained on the ground as the plaintiff left them, and the contract with notice of the plaintiff's rights were subject to them. The defendants, therefore, never acquired any title to the property as against the plaintiff.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with direction to render the proper judgment in favor of the plaintiff.

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WILTSE, Administratrix, Respondent, vs. THE TOWN OF TILDEN, Appellant.

May 20 — June 21, 1890.

(1-3) *Recovery for death of person: Pleading: Evidence: Damages.* (4) *Defective highway: Overflow: Duty to give warning.* (5) *Evidence: Opinions.*

1. In an action to recover for the death of a girl, a complaint alleging that the plaintiff, who sues as administratrix, was the mother of the intestate and dependent upon her in a large degree for support and had suffered pecuniary injury by reason of her death to an amount stated, is *held* sufficiently to show that the plaintiff was a person entitled to the money when recovered.
2. Evidence, in such case, that the plaintiff had been divorced from her husband and that the custody of the girl had been awarded to her, and evidence of her pecuniary necessities and of the education and capacity of the girl for earning money, was admissible.
3. A verdict, awarding $2,000 to a mother for the death of her daughter sixteen years old, upon whom she was largely dependent for support and who had some capacity for earning money, is *held* not excessive.
4. In an action against a town for the death of a person resulting from defects in a highway caused by an overflow of a neighboring creek, a charge to the jury that if the dangerous condition of the road at the time of the accident might reasonably have been anticipated by the town authorities, in view of the previous known defects therein and the nature of the creek, it was their duty to have closed up the road until it was repaired, or to have provided means for warning travelers of the danger, is *held* not erroneous.
5. The opinions of witnesses upon questions which the jury are as competent to determine as they, are inadmissible.

APPEAL from the Circuit Court for *Chippewa* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an action for damage by reason of the death of the plaintiff's intestate, caused by a defective highway. It appears from the record that the Bloomer road runs northerly from Chippewa Falls; that upon that highway, and

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about six miles north from Chippewa Falls, the Cook's Valley road, so called, branches off and runs in a northwesterly direction to a place called "Cook's Valley;" that about eighty rods from the Bloomer road the Cook's Valley road crosses what is known as "Duncan Creek," which at that place comes down on the northeasterly side of that highway, and then crosses to the southerly side of the same, and runs for some distance along that side of it, and then turns and runs nearly south; that in a high stage of water that creek spreads out over considerable portions of the Cook's Valley road; that between Chippewa Falls and Cook's Valley there was a stage line which carried the United States mail; that one Whittemore had driven that stage during the summer of 1887; that he was again employed in April, 1888, and started on his first trip from Chippewa Falls about twenty minutes after 7 o'clock on the morning of April 28, 1888, with a single seated buggy, taking with him, as his only passenger, Kate Wiltse, the intestate, a girl between sixteen and seventeen years of age; that it was a stormy morning, raining most of the time.

Whittemore testified to the effect that he was, at the time, upwards of twenty years of age; that he had earned his own living since he was twelve, working about the woods, on the river, and driving livery, stage, etc.; that he reached Duncan creek about 9 o'clock of the morning mentioned; that as he drove down the hill towards the creek he looked across, and could see the bridge all right, about two feet above the water in the creek; that the land between him and the bridge was considerable lower than the bridge; that the water was running over the road in such low portions; that from the looks he thought it was all right; that he drove right along a little ways, and then went out and unchecked the horse, so he could drink; that he started along and drove the horse into the water, where at first it was a

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little above his ankles, and then went along until the water got pretty near up to his knees; that there then seemed to be a kind of hill, and the horse stopped, and then started, when the water was about to his ankles again and dirty; that the girl then said, "I guess we are all right now;" that he replied that he guessed so; that "just then the horse went right off in on his head;" that the "hole was right in the center of the traveled track," and some two or three rods from where he first drove into the water; that the bridge was some four to eight rods beyond the hill; that "we went right off into the hole on the plunge, and swung right around to the left, and tipped the buggy over;" that he caught the girl with his left hand, and they both fell out of the buggy at the same time; that he could not tell the depth of the hole, but that it was something like six or eight feet; that he swam with the girl a little piece, and then went under the water; that when he came up they were about six feet out from the shore; that he caught the brush with his right hand, and then turned around and went under the water, and came up eight or ten feet below, and that was the last he saw the girl before she was dead; that half an hour after the accident the water in the creek was two or three feet higher than when he first drove into it; that after going to Chippewa Falls and returning, and between 1 and 2 o'clock of the same day, the water was five or six feet deeper than at the time of the accident.

The plaintiff was appointed administratrix of the estate of said deceased, and commenced this action to recover damages by reason of the girl's death. The complaint is in the usual form in such cases. The answer denies the alleged defect in the highway, and alleges contributory negligence. At the close of the trial the jury returned a general verdict in favor of the plaintiff, and assessed the damages at $2,000. They also, in answer to a special ques-

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tion submitted, found, in effect, that neither the deceased nor the driver with whom she was voluntarily riding was guilty of any want of ordinary care at the time of the accident, which contributed to the happening of the accident. From the judgment entered upon such verdict the defendant appeals.

Arthur Gough, attorney, and *John J. Jenkins*, of counsel, for the appellant, contended, *inter alia*, that a complaint under sec. 4256, R. S., is not sufficient unless it specifies the particular relatives who are legally entitled to the damages. So far as the complaint in this case shows the deceased may have left a husband and descendants, or a father as well as a mother. *Burlington & M. R. Co. v. Crockett*, 17 Neb. 570; *Safford v. Drew*, 3 Duer, 627; *Regan v. C., M. & St. P. R. Co.* 51 Wis. 599. Evidence of the mother's pecuniary circumstances should not have been admitted. *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179; *Mayhew v. Burns*, 103 id. 328; *Rooney v. Milwaukee Chair Co.* 65 Wis. 397.

For the respondent there was a brief by *Anderson & Bowe*, attorneys, and *T. J. Connor*, of counsel, and oral argument by *Mr. Connor*.

CASSODAY, J. A careful examination of the printed case convinces us that there is sufficient evidence to support the general verdict and also the particular finding against contributory negligence; and hence there was no error in refusing to nonsuit the plaintiff or set aside the verdict on that ground. The law in respect to such cases has been fully considered in *Hopkins v. Rush River*, 70 Wis. 10, and *Jung v. Stevens Point*, 74 Wis. 547.

This action is brought under secs. 4255, 4256, R. S. It is claimed that the complaint does not sufficiently allege the representative character of the plaintiff to sustain this action. It alleges, in effect, that the plaintiff was the mother

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of the intestate, and dependent upon her in a large degree for support, and had suffered pecuniary loss, damage, and injury by reason of her death, in the sum stated. The statute provides that "every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to" the person or persons entitled as therein designated. Among the persons thus designated are, in default of descendants, the deceased's "lineal ancestors," which, of course, include her mother. It will be observed that the action is to be brought by and in the name of the personal representative of such deceased person; that is to say, by the executor or administrator of the estate of the deceased in his representative capacity. *Whiton v. C. & N. W. R. Co.* 21 Wis. 310. Here the mother, as administratrix, brings this action as such personal representative.

Of course it must appear by pleading and proof that there is a person in being who is entitled to the money when recovered. *Woodward v. C. & N. W. R. Co.* 23 Wis. 400. Here the facts alleged sufficiently show the mother to be such a person. If there is any one else entitled, such claim can be considered on the distribution of the fund. In this connection it was proper to admit in evidence the judgment of the divorce of the plaintiff, and the awarding of the custody of the girl to the mother, and also evidence of her pecuniary necessities, and the education and capacity of the girl for earning money; and hence the objections to such testimony were properly overruled. *Johnson v. C. & N. W. R. Co.* 64 Wis. 425.

We must sustain the court in rejecting improper cross-examinations and leading questions. The court properly rejected the opinions of witnesses upon questions which the jury were as competent to determine as the witnesses, and also as to what other witnesses did in marking the stage of the water; also as to whether the brush, at the begin-

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ning of the Cook's Valley road, had previously been placed there to direct travelers to go by a different route.

Exception is taken because the court in charging the jury stated, in effect, that the defendant admitted, or there was no question on the evidence, that the highway, at the time and place mentioned, was unsafe and out of repair, but that the defendant claimed that it had become so suddenly, and by an extraordinary rainfall, etc. It seems to us that such statement was fully justified by the evidence in the record. Exception is also taken because the court charged the jury that, "if you believe that the defendant had notice of the condition of the road as it was immediately *before the rise* of water in the creek,—*and of that, on the evidence, there can be no question,*—you will consider whether the condition of the highway on the morning of the accident, after the water had overflowed the road, considering the previous defects and the nature of the creek, was one that might reasonably have been anticipated by the town authorities. If the condition of the road immediately preceding the rise of water was such that the dangerous condition caused by such rise of water might reasonably have been expected by such town authorities, and the notice of such previous condition, then it was incumbent on the part of the town to either have closed up the road till it was repaired, or provided such means as to have warned persons traveling on such highway, in the exercise of ordinary care, of the danger." This portion of the charge seems to be sufficiently guarded, and was, as we think, justified by the evidence. The charge of the learned circuit judge is full and fair, and we find no error in it.

It is claimed that the damages are excessive. But we do not feel authorized by the record to say that the jury were misled either by passion, prejudice, or ignorance, and hence, under the repeated rulings of this court, we are not authorized to interfere. *Johnson v. C. & N. W. R. Co.* 64 Wis.

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431, 432, and cases there cited. In such a case the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life, even beyond the minority. *Ibid.*

By the Court.— The judgment of the circuit court is affirmed.

TRUSTEES OF THE FIRST CONGREGATIONAL CHURCH AND SOCIETY OF OSHKOSH, Appellant, vs. THE MILWAUKEE & LAKE WINNEBAGO RAILROAD COMPANY, Respondent.

May 21 — June 21, 1890.

RAILROADS: CONDEMNATION OF LAND. (*1*) *Petition by owner: Pleading: Burden of proof.* (*2–4*) *What constitutes taking? Track constructed on further side of street: Filling of street: Erection of gates.*

1. Whether the railroad company should file an answer to a petition for the appointment of commissioners to appraise the damages for an alleged taking of land, and whether, in the absence of any answer, the burden is upon the petitioner to establish the facts alleged, not determined.
2. The owner of property on one side of a street is not entitled to compensation by reason of the building of a railroad track along the other side of the street, wholly beyond the center line thereof, where such track was legally built prior to the enactment of ch. 255, Laws of 1889; and, where the city makes no complaint, such owner cannot claim compensation under that statute on the ground that the track was not legally built because not located in the center of the street, as required by a city ordinance.
3. A slight filling of gravel on the street, to restore it to its former usefulness and to enable vehicles more conveniently to pass over the track into an alley, does not entitle such owner to compensation.
4. The erection and maintenance of gates or barriers in a street at a railroad crossing, pursuant to a municipal ordinance requiring the same for the safety of the public, is not such a taking of land as will entitle the owners of abutting lots to compensation.

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APPEAL from the Circuit Court for *Winnebago* County.

The appeal is from an order dismissing a petition for the appointment of commissioners to appraise the damages for the taking of certain lands by the railroad company. The petition, which was duly verified, alleges that the plaintiff is the owner of a lot in the city of Oshkosh, fronting upon Bond street on the east and upon Algoma street upon the north, upon which is located its church building; that the defendant company has built a railroad along said Bond street and across Algoma street, and in building the same has raised its track higher than the grade of the street and has built an embankment on the part of Bond street owned by the plaintiff, being a part of its said lot; that the defendant, in building said railroad, has also dug, excavated, and carried away a large quantity of the earth composing said lot in Bond street and Algoma street, and placed upon said lot superstructures which are a constituent part of said railroad, and which the defendant is under legal obligation to maintain permanently on said lot as a part of said railroad, and which it does now maintain; that all of the acts and things done by the defendant as aforesaid were necessitated by the construction of its railroad; that the plaintiff's lot has been greatly damaged by the construction of said railroad, and by the acts and things done by the defendant thereon, and by the passage of trains over said streets, and by smoke, jarring, and noise from the engines, and has been rendered much less valuable; that the defendant has omitted and refuses to prosecute proceedings for the condemnation of the plaintiff's interest in said streets and for the assessment of its damages; and that the defendant has not acquired title to the plaintiff's land or the right to enter thereon and to maintain thereon the said railroad or any part thereof or the said embankment or superstructures, and has not paid the damages sustained by the plaintiff thereby.

The defendant did not serve or file any answer to the

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petition. Upon the hearing the plaintiff claimed that the facts stated in the petition, not having been denied, were to be considered as established, and that the burden of disproving them was upon the defendant. The circuit court held that the burden was upon the plaintiff to make out a *prima facie* case, and the plaintiff introduced his evidence accordingly. The facts shown by the evidence on the hearing will sufficiently appear from the opinion.

H. B. Jackson, for the appellant, contended, *inter alia*, that the trial court erred in holding that the burden of proof was upon the plaintiff, notwithstanding the defendant omitted to take issue on said petition either by answer or affidavit. Lewis, Em. Dom. sec. 390; *Aurora & C. R. Co. v. Miller*, 56 Ind. 88; *Tracy v. E., L. & B. S. R. Co.* 80 Ky. 259; *In re St. Paul & N. P. R. Co.* 34 Minn. 227; *In re Lockport & B. R. Co.* 77 N. Y. 557; *In re New York, L. & W. R. Co.* 35 Hun, 220; *S. C.* 99 N. Y. 12; *South Carolina R. Co. v. Blake*, 9 Rich. (S. C.), 228; *Wis. Cent. R. Co. v. Cornell University*, 49 Wis. 162; *S. C.* 52 id. 537–541; *In re New York Cent. R. Co.* 66 N. Y. 407; *Shealy v. C., M. & N. R. Co.* 72 Wis. 471. The proofs showed a "physical interference" by the railroad company with the plaintiff's land, by the placing of an embankment thereon for the purpose of restoring the street. They showed also an invasion by the company, and the digging and carrying away of the soil which was a part of the plaintiff's land, and the erection and maintenance of permanent structures thereon. The presumption from the ordinance introduced in evidence by the defendant, and which provides that the location of the railroad shall be along the "center line of Bond street," is that the *right of way* is along such center line, even though the *track itself* is to the east thereof. If such presumption does not arise then the railroad was not legally built, and the plaintiff can avail itself of ch. 255, Laws of 1889.

Charles W. Felker, for the respondent.

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COLE, C. J. Since, upon the merits, we think no case was made for the appointment of commissioners to appraise damages to the petitioner's property, we shall not decide the question of practice, as to whether or not an answer should have been filed to the petition so as to form an issue for trial. As a matter of fact, the parties went to a hearing and took testimony as though the statements in the petition had been formally denied; and, as we have intimated, we think the proof showed no taking of the property for which damages should be assessed.

It appears from the petition and proofs that the lot in question is situated on the west side of Bond street, fronts on Algoma street on the north, and is bounded on the south by an alley. Bond street is seventy feet wide, and the railroad track is laid in that street, a number of feet east of the center line thereof. That is to say, at the southern boundary of petitioner's lot, where the railroad track intersects the line drawn east and west through the center of the alley, it is more than sixteen feet east from the center of Bond street, and, at the point where the railroad track intersects the center line of Algoma street, it is more than ten feet east of the center of Bond street. So it appears that the entire railroad track is located quite a distance from the petitioner's lot, and it does not appear that any of its land has been either actually or constructively taken for the use of the corporation. Nor do we think the proof shows any such interference or invasion of the petitioner's lot as entitles it to compensation under the decisions of this court; for the rule here is well settled that there must be some actual, physical interference with or taking of the property for which damages are given. *Heiss v. M. & L. W. R. Co.* 69 Wis. 555, and cases cited in the opinion.

But it is claimed that an embankment was made on the petitioner's lot in the street, so as to bring the case within the rule of *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, and 60 Wis.

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264, and *Shealy v. C., M. & N. R. Co.* 72 Wis. 471. There was no excavation of the street in this case, as in those cases; but the evidence does show that about six inches of gravel was placed in Bond street west of the track on a line with the alley, so as to enable teams with wagons more conveniently to pass over the track into the alley than they otherwise could do without such filling. The top of the west iron rail was seven tenths of a foot higher than the street surface. The track was planked between the rails, and this gravel was put in west of the rail, sloping to the sidewalk, so as to make a proper passage-way. This filling became necessary, in fact, to restore the street at that point to its former condition of usefulness, but it affords no ground for complaint by the owner of the lot. The facts present a case so unlike those to which we have just referred that no comment is required to mark the distinction between them.

But it is further claimed that there was a taking of a part of petitioner's lot in Algoma street for the purpose of constructing and maintaining thereon, by the railroad company, their gates and barriers for the safety of persons traveling on the street. These gates were four in number. Two were on the east side, and two on the west side, of Bond street, and were connected by rods running underground through boxes, and are raised and lowered by means of a crank at a gate-house on the east side of Bond street. These gates were built pursuant to an ordinance of the common council requiring the company, at railroad crossings, to erect and maintain such barriers for the safety of the public. The gates are constructed in the usual way, and are not, strictly speaking, a part of the necessary appliances for operating a railroad, though they are very essential for the protection of the public, and are maintained at the expense of the corporation. But still, requiring the railroad corporation to construct them would seem to be a proper exercise of the police power to guard against acci-

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dents from collision; and we have no doubt but the common council might compel them to be erected by the corporation, or might have erected them at the expense of the city itself. Now, suppose the city had put up these gates, would it have been liable to make compensation to the petitioner, as an abutting lot-owner, because it had placed them at the corner of the streets? It seems to us it would not be bound to make compensation in the case supposed, nor do we think they constitute any ground for assessing damages against the railroad corporation for the slight inconvenience which their maintenance and repairs may occasion the petitioner. Such safety gates would seem to be very advantageous and desirable for the protection of persons and carriages which would usually congregate at that crossing on Sundays, and, instead of being regarded as detrimental to the church property, appear to be highly necessary and requisite for its use and enjoyment. At all events, by the corporation placing them at the corners of the streets in obedience to the ordinance of the city, no such burden is imposed as will entitle an abutting lot-owner to damages. It seems to us to be a very wise and proper exercise of the police power vested in the municipal authorities to require them to be erected for the safety of the lives and property of citizens.

But it is further contended that the petitioner is entitled to have damages assessed under ch. 255, Laws of 1889. That act, in effect, provides that abutting owners of land on a highway, street, or alley heretofore or hereafter laid out or used as such shall have a common right in the full and unobstructed use of such highway, street, or alley to the extent of its full width, and no corporation shall use or obstruct any such highway, street, or alley, or any part thereof, so as to materially interfere with its usefulness as a highway, or so as to injure or damage property abutting thereon on either side, or authorize or permit the same to

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be done, without due compensation being made for any damage resulting therefrom to the owners of property on both sides of that part of such highway, street, or alley so closed up, used, or obstructed: provided, however, that the act shall not be so construed as to require payment of damages to property on both sides of any street, highway, or alley arising from the construction, use, or operation hereafter of any railroad track heretofore legally laid out or established in such street or alley. We cannot see what aid this law affords the petitioner's case. The proviso expressly excludes the payment of damages to property on both sides of a street arising from the operation of a railroad track heretofore *legally built.* This railroad track was laid along Bond street in 1882, and the safety gates in Algoma street were built in 1885. But it is said by the petitioner's counsel that the track was not legally laid, because it was not placed in the center of Bond street, as the ordinance of the city on the subject required. But the city makes no complaint that the track was laid out of the center of that street. Besides, the general statute (subd. 5, sec. 1828, R. S.) gave the railroad corporation the right to construct its road across or along any street which its route should intersect, and this would control the ordinance where they came in conflict.

As the gates were built by the direction of the municipal authority under the police power conferred by the charter, and as there was no taking of the petitioner's land other than the erection of these barriers, which does not amount to a taking in the contemplation of the law as expounded by our decisions, the order of the circuit court refusing to appoint commissioners must be affirmed.

By the Court.—Order affirmed.

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OUTAGAMIE COUNTY, Respondent, vs. THE TOWN OF GREENVILLE, Appellant.

May 21—June 21, 1890.

Taxation: Review of equalization of assessments: Allowance of accounts of commissioners: Liability of town for expenses of commission.

1. Where the decision of commissioners appointed to review the equalization of assessments does not operate to reduce the amount of taxes to be paid by the town applying for their appointment, it is "adverse" to such town, within the meaning of sec. 4, ch. 291, Laws of 1880, and renders it liable to reimburse the county for the expenses of the commission.
2. An error of the commissioners, in increasing the aggregate valuation of property contrary to law, would not defeat their right to compensation.
3. The valuations of the real and the personal property as fixed by the county board were placed in separate columns, and a third column purported to contain the aggregate of such valuations for each town and city. *Held*, that errors of computation in such third column did not affect the actual valuations contained in the other two; and where the aggregate of such valuations was not increased by the commissioners appointed to review the equalization, a mistake of the county clerk in computing the taxes to be raised by the several towns and cities on the basis of the erroneous total of the third column, even though it reduced the amount to be raised in the town which applied for the appointment of the commissioners, could not affect the liability of such town for the expenses of the commission.
4. In the absence of fraud or collusion, and where there has been a substantial compliance with the statute, the allowance by the county board of the accounts of the commissioners for their services and expenses is binding upon the town which is chargeable therewith.
5. But if such accounts are not properly itemized as required by sec. 677, R. S., their allowance by the county board is not binding upon such town.
6. An account for "seventy days' service as commissioner, $280," and one for "fifty days' service of livery for commissioners, at $4.50 — $225," it appearing that such services were performed between May 9 and August 8, 1888, are *held* to have been sufficiently itemized, although they did not give the date of each day's service. But an account for "hotel expenses and railroad fare, etc., $171.42" is *held* not sufficiently itemized.

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7. The commissioners, being empowered by sec. 2, ch. 212, Laws of 1882, to conduct their proceedings "after the usual manner of a judicial hearing," may, within reasonable limits, make a view of the real estate in the county, and will be entitled to their *per diem* and necessary expenses while so engaged.

APPEAL from the Circuit Court for *Outagamie* County.

The defendant, the town of *Greenville*, which is one of the towns of the plaintiff county, made application to the judge of the circuit court to appoint commissioners to review the assessment for taxation for the year 1887 of the real estate in that county, as equalized by the county board of supervisors. The application was made pursuant to ch. 291, Laws of 1880, as amended by ch. 212, Laws of 1882. Commissioners were thereupon appointed, and on August 8, 1888, filed their report with the county clerk. They increased or diminished the valuations of real estate as equalized by the county board, in ten towns and cities of the county, but did not change such valuation in the town of *Greenville.*

Thereafter each of the commissioners presented his verified account for services and expenses to the county board for allowance, and the same were allowed by the board and afterwards paid by the county. The board also allowed and paid a verified account for the hire of a team used by the commissioners in the performance of their duties. These accounts aggregate $1,538.40. One of them is for seventy days' service as commissioner, $280, and for "hotel expenses and railroad fare, etc., $171.42." The accounts of the other commissioners are in the same form, but for different amounts. The livery bill is for "fifty days' service of livery for commissioners, at $4.50=$225."

This action was brought by the county to recover of the town of *Greenville* the amount so paid for such services and expenses of the commission. The county recovered judgment for the sum claimed, and the town appeals from the judgment.

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I. C. Sloan, for the appellant.

For the respondent there was a brief by *John Goodland*, district attorney, and *John Bottensek*, and oral argument by *Mr. Bottensek*.

LYON, J. I. Sec. 4, ch. 291, Laws of 1880, provides that if the decision of the commissioners appointed to review the equalization of assessments for taxation made by the county board of supervisors "is adverse to the city, town, or village making the appeal, such city, town, or village shall reimburse the county for all expenses so paid." The object of such an appeal is to procure a reduction of the state and county taxes which the city, town, or village so appealing would be required to pay were the taxes levied upon the assessments as equalized by the county board. Failing to accomplish that purpose, the appellant fails in its appeal. In the present case, the equalization of the commissioners does not operate to reduce the amount of such taxes which the town of *Greenville* would have been required to pay had the same been levied upon the assessments as equalized by the county board. Hence the decision of the commissioners was adverse to the town, and it is liable to the county for the expenses of the commission, unless relieved therefrom by some fatal error in the proceedings.

It may here be observed that the law relating to liability for expenses in such cases has been materially changed by the enactment of ch. 201, Laws of 1889; but that statute has no application to this case. The present law on this subject is contained in secs. 1077*a*, 1077*b*, S. & B. Ann. Stats.

II. It is claimed on behalf of the defendant town that the commissioners increased the aggregate valuation of taxable property in the county as equalized by the county board of supervisors, to the amount of $10,606, in violation of sec. 1, ch. 291, Laws of 1880, and hence that they

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are entitled to no compensation for their services and expenses. Were it true that they so increased the valuation, it is not perceived that the error works a forfeiture of their right to such compensation. It frequently happens, in practice, that the reports of referees are set aside for errors in their procedure, but we are not aware that it was ever held, and have never heard it claimed, that such errors defeated the right of the referees to compensation for their services. We discover no difference in principle between the case of a referee in an action and commissioners acting under the above statutes respecting their right to compensation.

But we do not think the commissioners increased the aggregate valuation of taxable property fixed by the county board. Such valuation is found in a table containing in one column the valuation of real estate, and in another of personal property in each town and city in the county. A third column contains what purports to be the aggregate of such valuations of real and personal property in each of such towns and cities. The column of such aggregates is correctly footed in the table at $8,300,900. The other columns are not footed. The aggregate of real estate therein is $6,419,852, and the commissioners equalized it at the same figures. The appeal being only from the equalization of real estate by the county board, the commissioners did not interfere with the valuations of personal property. Such valuation is $1,891,654, which, added to the real estate valuations, makes an aggregate of $8,311,506, or $10,606 in excess of the sum of the aggregates in the third column of the table. This discrepancy is caused by errors in adding together, in the third column, the valuations of real and personal property in the city of Kaukauna and the towns of Dale and Deer Creek, and inserting in such third column amounts less than the true amounts by $10,000, $600, and $6, respectively. Had the true aggregates been carried

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into the third column, it would foot $8,311,506, which is the sum of the two columns of valuations.

We agree with the learned circuit judge that the two columns of valuations contain the real decision and judgment of the county board, the third column being merely the result of the clerical act of combining the other two, and hence that errors of computation in making up that column do not affect the actual valuations contained in the other two, the aggregate of which was not increased by the commissioners. We regard it immaterial that the county clerk computed the state and county taxes to be raised by the several towns and cities in the county on the erroneous basis of $8,300,900, even though that computation would, as it is claimed, reduce the taxes to be raised in the defendant town a trifle. The mistake of the clerk in that behalf cannot affect the liability of the town for the expenses of the commission.

III. To what extent the town is bound by the action of the county board in allowing and paying the accounts of the commissioners for services and expenses, and whether, when sued by the county for the amount so paid, it may controvert the justice, legality, or accuracy of the accounts, are questions which have not been determined in this state. Yet we think the solution of them is not difficult.

The law on the subject which rules this case is found in sec. 4, ch. 291, Laws of 1880. The material portion thereof is as follows: "The said commissioners . . . shall be entitled to receive four dollars each for every day in which they shall be actually employed in the discharge of their said duties, in addition to their actual expenses; the same, with all other expenses connected with the making of the application and the subsequent proceedings, to be audited and allowed as a county charge by the county board of supervisors and to be paid in the same manner as other county charges are paid." Then follows the provision above

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cited, requiring the appellant, if the decision of the commissioners is adverse to it, to reimburse the county for such expenses so paid by it.

The above statute confers upon the county board the authority to audit and allow the *per diem* and expenses of the commissioners, earned and incurred by them in the discharge of their duties, and imposes upon it the duty to do so. The statute also requires the county, in the first instance, to pay the sums so allowed, and charges the town with the obligation to reimburse the county for all sums so paid. The town is represented in the county board by its supervisor, who has, presumably, every reasonable opportunity to protect and defend its rights in the matter of allowing the accounts of the commissioners. The town is chargeable with notice of the proceedings, and, had it desired to do so, might have contested the accounts. The town is ultimately liable for such expenses, and the law designates the county board as the tribunal to determine the amount thereof. There is no evidence of any fraud or collusion on the part of the board. If the procedure is in accordance with the requirements of law, it seems very clear that the town should be held bound by the determination of the county board.

This brings us to consider whether the county board proceeded in accordance with the requirements of law. If it did, we see no escape from the conclusion that the town is liable for the whole amount allowed by the board and paid by the county.

It appears from the evidence that the commissioners traveled extensively through the county, making a personal examination of the lands therein to aid them in their decision; that at least fifty days of the time for which they were allowed compensation were spent in so doing; and that the bill for team hire was thereby incurred. It is claimed by the learned counsel for the town that the statute

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specifically directs the procedure of the commissioners, but fails to authorize them to make any such extended examination of the lands in the county, and hence they are not entitled to compensation for so doing or for their expenses thus incurred. Counsel further maintains that the accounts in question are not properly itemized as required by statute, and hence that the county board had no authority to act upon them. These propositions will be briefly considered.

1. Sec. 677, R. S., provides that "every person . . . having any such claim [*i. e.*, a claim for money only,—sec. 676] against any county shall make a statement thereof in writing setting forth the nature of his claim and the facts upon which it is founded, and, if the claim be an account, the items thereof separately, and the nature of each. . . . Such statements shall be verified by the affidavit of the claimant, his agent or attorney, and filed with the county clerk; and no such claim against any county shall be acted upon or considered by any county board unless such statement shall have been so made and filed." The former statutes on this subject (R. S. 1849, ch. 10, sec. 32; R. S. 1858, ch. 13, sec. 37) differ somewhat in their phraseology from sec. 677 of the present Revised Statutes. The former statutes seem to have been regarded by this court in *Parker v. Grant Co.* 1 Wis. 414, and *Eaton v. Manitowoc Co.* 40 Wis. 668, as merely directory, and that failure to comply therewith did not go to the jurisdiction of the board to allow an account not thus itemized and verified. The accounts in question in those cases were against the county alone, and in such cases the power of the county board is almost plenary. Whether, in view of the changed phraseology of sec. 677, it ought to be held that the county board has jurisdiction to allow an account chargeable only to the county, which is not itemized or verified as required by that section, is not here determined. We do determine, however, that in this case, in which the action of the board is in-

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tended to charge a liability upon the town, such town may insist upon a substantial compliance with the statute, and will not be held liable unless the board has complied therewith.

The charges for services are, we think, sufficiently itemized. The records in the office of the county clerk show that such services were rendered between May 9 and August 8, 1888. The accounts could only have been made more specific by giving the date of each day's service. We do not think this was necessary, although, doubtless, the county board might have required it. The same observations apply to the livery bill. We conclude that as to the *per diem* of the commissioners, and the charge for livery, the accounts are sufficient in form. They are also properly verified.

2. The charges in the accounts of the commissioners for "hotel expenses, railroad fare, etc.," are not itemized as required by sec. 677. By allowing the same in that form, the board failed to charge the town therewith. This is the necessary result of the rules above stated.

3. Are the charges for viewing the real estate of the county legal charges against the town? The statute under which this question must be determined is sec. 2, ch. 212, Laws of 1882 (1 S. & B. Ann. Stats. sec. 1077*b*). That section, after some particular specifications of the duties of commissioners, confers upon them the power to conduct their proceedings "after the usual manner of a judicial hearing." One of the usual methods of conducting a judicial hearing is for the court or jury to view the property or thing in controversy, when that course is deemed essential to a correct understanding of the testimony in the case. Moreover, the commissioners exercise to some extent the functions of assessors, for on a larger scale they are required to determine the relative value of taxable property in the county. Sec. 1052, R. S., contemplates that assessors shall fix the value of real estate upon actual view thereof, as far

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as practicable. At least it authorizes them to make such view. The value of a general view of the real estate in the county by the commissioners, in order to enable them to determine the relative value of the real estate in the several towns, cities, and villages thereof, is obvious. From the above considerations we conclude that it is competent for the commissioners, within reasonable limits, to make such view, and hence that they are entitled to their *per diem* and necessary expenses while so engaged.

IV. Some question is made on the evidence whether the commissioners were engaged in the performance of their duties the number of days for which they have been allowed compensation. It follows from what has already been said that we cannot determine that question. There having been no fraud or collusion on the part of the county board, and that board having before it verified accounts in proper form for such services, the allowance of the accounts is a final determination of the amount of services rendered, and binds the town. It is no sufficient answer to this proposition to say that it deprives the town of its day in court on the question of the amount of services rendered by the commissioners. As already stated, the town had its representative in the county board to look after and defend its interests, and it has been fully heard in this action to contest the power of the board to bind it by allowing the accounts and the regularity of the proceedings to that end. This, we think, fulfils all constitutional requirements without further allowing the town to litigate in this action the number of days the commissioners were actually employed in the discharge of their duties.

By the Court.—The judgment of the circuit court is reversed, and the cause will be remanded with directions to that court to render judgment for the county for the amount of the *per diem* of the commissioners, and the livery bill, allowed by the county board.

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GORES, Administrator, Respondent, vs. GRAFF, Appellant.

May 22 — June 21, 1890.

Physicians and surgeons: Action to recover for death of patient: Proximate cause: Preponderance of evidence: Instructions to jury: Damages.

1. In an action against a surgeon to recover damages for the death of a person, alleged to have been caused by the defendant's failure to treat him properly, there can be no recovery unless it is proved sufficiently to bring conviction to a reasonable mind, without resorting to mere conjectures or uncertain and inconclusive inferences or bare probabilities, that the defendant's failure in his duty was the proximate cause of the death.
2. The jury should not be instructed that if there is a preponderance of evidence tending to prove the facts essential to a recovery they should find for the plaintiff. The instruction should be that if the jury are satisfied from a preponderance of the evidence that all such facts have been proved they should find for the plaintiff; otherwise, for the defendant.
3. Since the amount recovered in an action for the death of a person belongs to the relatives specified in sec. 4256, R. S., the jury should not be instructed to give damages to recompense the *estate* of the deceased.

APPEAL from the Circuit Court for *Eau Claire* County.

The defendant is a physician and surgeon, and was employed to treat a wound received by the plaintiff's intestate, Hakon Oleson, who afterwards died from the effects thereof. This action was brought under sec. 4255, R. S., to recover damages for the death of Oleson, alleged to have been caused by the unskilful and negligent treatment of the wound by the defendant.

On March 12, 1887, the plaintiff's intestate was engaged with another in splitting a log, when the axe of his fellow-workman flew off the handle, and the edge of the axe struck Oleson a little above the right knee, inflicting a wound from one and a half to two inches in length. The testimony tends to show that the axe penetrated the knee-

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joint through the membranes covering it. Oleson resided in Eau Claire, and when injured was at work in the woods some distance from his home. His fellow-workman inserted chewed tobacco quids in the wound, bound it up, and took him in a sleigh to Arcadia, the nearest railroad point, about eighteen miles distant. He was then brought on a train to Eau Claire, and taken to his home, reaching there the next morning. Whether the tobacco quids were removed before he left the woods, or remained in the wound until he reached his home, and whether the wound was bandaged with filthy or clean cloths, are disputed questions in the case.

On the arrival of Oleson at his home, *Dr. Graff*, the defendant, was called to treat him, and first saw him towards noon of that day. He applied what is called the antiseptic treatment, which it is not denied was correct practice, and dressed the wound properly. He called to see Oleson the next day, but did not remove the bandages. He next visited him March 19th, removed the bandages, and examined and dressed the wound. Up to this time it is not seriously controverted that the treatment was in strict accordance with the approved rules of surgery. He informed Oleson's wife that he would not call again until March 27th, unless Oleson grew worse, in which case he left a request that he be sent for.

The wound commenced growing worse soon after March 19th, and developed much inflammation, causing great pain. The testimony tends to show that *Dr. Graff* was sent for March 25th, and informed of Oleson's condition, but did not visit him again until March 27th. He then found Oleson in a very bad condition. The limb was much swollen, discharging large quantities of pus, and the patient was suffering intense pain. He again examined and dressed the wound, putting in proper tubes for the discharge of the pus. The testimony tends to show that on this occasion he flexed the limb with violence, causing the patient intense

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pain. He visited the patient, successively, on March 31st and April 2d, 5th, and 8th, pursuing the same general treatment. On April 9th Dr. Christensen was called in. He removed the bandages, examined the limb somewhat, and then restored the bandages, but did nothing further. He declined to take the case until he could advise with another physician, and until *Dr. Graff* should be dismissed. *Dr. Graff* was thereupon dismissed, and on the next day Dr. Christensen, accompanied by Dr. Day, made an examination of the wound. They became satisfied that in order to save Oleson's life it would be necessary to amputate the limb, but that such was his condition this could not be done without fatal results, until he could be strengthened. Dr. Christensen thereupon took charge of him, and by tonic treatment succeeded in improving his condition, so that on April 29th the limb was successfully amputated without any very serious shock to the patient. From that time until his death he was under the care of Dr. Pinkerton, the city and county physician. He continued to improve for several weeks after the amputation, and Dr. Pinkerton thought he might recover. Then his symptoms took an unfavorable turn, and he continued to grow worse, until he died from exhaustion on August 12, 1887.

A trial of the action resulted in a verdict for the plaintiff, assessing damages at $2,500. A motion for a new trial was denied. The case is further stated in the opinion. Judgment was rendered pursuant to the verdict. The defendant appeals from such judgment.

W. F. Bailey, for the appellant.

T. F. Frawley, for the respondent.

LYON, J. We have reached the conclusion that the judgment in this case must be reversed for material errors in the instructions given by the learned circuit judge to the jury. But, before proceeding to the consideration of such

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instructions, it seems necessary to make a few general observations upon the testimony in the case bearing upon them.

We do not say that the testimony is insufficient to support the judgment, but should say that, after a most careful consideration thereof, we are impressed with the thought, or at least the fear, that too much of mere conjecture has entered into the verdict. Undoubtedly the testimony is sufficient to support a finding that by his failure to visit Oleson more frequently *Dr. Graff* failed to perform his duty to his patient. In view of the result, *Dr. Graff* frankly admits that it would have been better had he seen the patient at shorter intervals. Then the manner in which he treated the limb on March 27th, if such treatment is correctly stated by plaintiff's witnesses, was certainly bad surgery, and may have led to serious consequences. However, if *Dr. Graff's* testimony on that subject be taken as true,—if he flexed the limb carefully and gently for the purpose of causing the pus to discharge from the wound,—the medical testimony satisfactorily shows that it was proper practice. But it was competent for the jury to discredit his testimony, and accept as true that of the plaintiff's witnesses. Hence, had Oleson lived and brought an action for malpractice against *Dr. Graff*, we should probably have to hold that a verdict, based on the same testimony we have before us, would be supported by the proofs.

This is not an action to recover damages for malpractice, in which the plaintiff would be entitled to recover if he established the fact that the surgeon failed in his duty, to the injury of the patient; but it is an action under the statute (R. S. sec. 4255), in which there can be no recovery unless the plaintiff has proved that the failure of *Dr. Graff* to perform his professional duty was the direct cause of the death of Oleson. If there was any intervening cause, in the absence of which it is reasonably probable that Oleson

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would not have died, the action cannot be maintained. There can be no recovery unless it is reasonably probable that Oleson would have lived had *Dr. Graff* treated him properly, and the existence of such reasonable probability must be proved; that is to say, facts and circumstances must be proved sufficient to bring conviction to a reasonable mind, without resorting to mere conjecture or uncertain and inconclusive inferences or bare probabilities, that the surgeon's neglect of his duty was the proximate cause of the death of his patient. The sad thought "it might have been" forces itself upon all in hours of sorrow and gloom; but, unless the thought is verified by substantial and reasonably conclusive proof, it furnishes no safe basis of judicial judgment.

It is a frequent occurrence that patients change physicians; also, that the second physician called disapproves the treatment of his predecessor, and changes it (perhaps properly), and the patient dies. In such a case, if it should appear that the practice of the physician first called was incorrect, there is always room to conjecture that, had the patient been properly treated in the first instance, he would not have died. And yet, if a verdict based upon mere conjecture could be sustained, holding the physician first employed guilty of causing the death of the patient, the practice of medicine and surgery would be most perilous callings. The law does not subject the members of those or any other professions to any such peril.

Although the breach of his duty by *Dr. Graff* might have been a remote cause of the death of Oleson, the testimony tends to show the existence of other and more proximate causes of his death. Thus, it shows that the wound was a very dangerous one if it penetrated the knee joint, and tends to show that it did penetrate that joint. It also shows that the wound was dressed in the first instance by applying to it chewed quids of tobacco, and tends to show

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that it was bandaged with filthy rags, which, with the tobacco, remained on it until *Dr. Graff* dressed it, the next day after it was inflicted. All the medical witnesses agree that this was bad practice and increased the danger of disastrous results. The testimony also shows that Dr. Christensen, when he first saw Oleson, unbandaged the wound, but did not dress it, and left it wrapped in the bandages he found on it, which were saturated with an offensive discharge from the wound. The experts seem to agree that this was bad surgery. Moreover, it appears that the surroundings of Oleson were unfavorable to his recovery. He was poor, and the attendance, appliances, and food essential to secure his recovery were not within his reach. Considering these and other adverse circumstances, all beyond the control of *Dr. Graff*, in connection with the facts that the wound was properly treated by *Dr. Graff*, and the patient did well until after March 19th; that his general health improved under the treatment of Dr. Christensen so that the amputation was performed successfully on April 29th without any undue shock to the patient; that his symptoms were favorable, and he continued steadily to improve for several weeks thereafter before they took an unfavorable turn; and that he lived more than four months after *Dr. Graff* ceased to treat him,—it must be conceded, we think, that there is considerable room to doubt whether the evidence shows with sufficient certainty that the alleged neglect and wrong treatment of the wound by *Dr. Graff* was the direct cause of the death of Oleson.

In view of the above considerations, the following instruction given to the jury is a very important one: "This case should be decided upon a preponderance of evidence. It is not necessary that any fact should be proved beyond a reasonable doubt, much less to an absolute certainty. Such a degree of proof would be impossible in any case, and especially in a case like this, where so much depends upon the

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judgment of experts and is a matter of opinion only; hence the law does not require absolute certainty, but there must be only a fair preponderance of evidence tending to show the existence of any fact necessary to be proven as a condition of recovery, or as a fact relied upon to establish a defense."

The substance of the instruction is that, if there was a preponderance of evidence tending to prove a fact essential to a recovery in the action, the verdict should be for the plaintiff. This was manifest error. The instruction should have been that, if the jury were satisfied by a preponderance of evidence that all the facts essential to a recovery were proved, they should find for the plaintiff. Failing such proof, their verdict should be for the defendant. There may have been a preponderance of evidence tending to prove such facts, or some or all of them, and yet the evidence be quite insufficient to prove those facts. For example, the evidence tends to prove that the fatal blood poisoning and consequent death of Oleson was caused directly by bad surgery and neglect on the part of *Dr. Graff*. Under this instruction, if the jury were of the opinion that such evidence preponderated over that which tended to show the contrary, it was their duty to find for the plaintiff, although they might also have been of the opinion (had the question been submitted to them) that the testimony was not sufficient to establish such fact. In a case in which the facts are more clearly proved, such an error might be less significant; but when, as in the present case, it is very doubtful whether the facts essential to a recovery are proved, the error is a vital one, and necessarily fatal to the judgment. The case of *Dunbar v. McGill*, 64 Mich. 676, is in point. The ownership of a lot of sheep was there in question. The court submitted this question to the jury: "Is there more evidence to show that these were Mr. Dunbar's sheep than that they were not his sheep?" For reasons similar to

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those above suggested, this was held to be erroneous, and the judgment was reversed.

On the subject of damages the jury were instructed: "If you find for plaintiff, you will allow as damages such sum as you deem reasonable to recompense the *estate* of deceased for the death of Oleson, taking into consideration his age, health, and ability to earn money for the support of himself and family." This instruction is also erroneous. Under sec. 4256, R. S., the widow alone is entitled to the damages recovered in this action. The *estate* of the deceased belongs to his widow and children, of whom two survived him. By directing the jury to give damages to recompense the estate of the deceased, the court, in effect, instructed them that they might give damages for the injury sustained in his death by his children as well as his widow. This was error, and, because the instruction would almost necessarily increase the damages, the error is material. This has already been ruled, substantially, by this court in the cases of *Woodward v. C. & N W. R. Co.* 23 Wis. 404; *Schadewald v. M., L. S. & W. R. Co.* 55 Wis. 574; and *Kreuziger v. C. & N. W. R. Co.* 73 Wis. 162,— cited in the brief of counsel for the defendant. The question is sufficiently discussed in those cases, and nothing need be added to what is there said.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

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McWhinne, Respondent, vs. Martin, imp., Appellant.

May 22 — June 21, 1890.

(*1, 2*) *Vendor and purchaser of land: Oral contract: Statute of frauds: Part performance: Authority of agent: Ratification: Estoppel: Purchaser with notice.* (*3*) *Amendment of pleading: Discretion.*

1. Payment of any considerable part of the purchase price, and the vendee's entry into possession and making of improvements, constitute such a part performance of an oral contract for the sale of land as will take it out of the statute of frauds and justify the enforcement of specific performance.
2. The defendant B., a tenant in common of land and authorized by his co-tenants to sell the same, employed brokers to negotiate a sale, authorizing them to get offers and report them to him. Afterwards he wrote to the brokers that he wished to sell, and would take $450 for the land. The brokers showed this letter to the plaintiff, who accepted the offer, paid $50 down and deposited the balance in a bank to await a conveyance, and went into possession of the land and made improvements thereon. The brokers notified B. that they had made this sale, but he neglected for more than two months either to affirm or disaffirm the contract, and afterwards sold and, with his co-tenants, conveyed the land to the defendant M., who had knowledge of all the facts. *Held*, that there was a contract to convey the land to the plaintiff, which was binding upon both defendants.
3. Only in case of a clear abuse of discretion will this court interfere with the allowance by the trial court of an amendment to the complaint to make it conform to the evidence.

APPEAL from the Circuit Court for *Sauk* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This is an action in equity brought against *Charles E. Martin* and Walter L. Blossom to compel the specific performance of an alleged contract for the sale and conveyance of three forty-acre tracts of land lying on the shore of Devil's lake, in this state. The facts, as shown by the evidence, are substantially as follows:

The lands in controversy were at the date of the alleged

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contract owned as tenants in common in fee by said Walter L. Blossom and his two sisters, Mrs. Harmount and May C. Blossom. Walter L. Blossom was the duly-appointed agent of his said sisters, with full power to manage and sell said lands as he thought best. The three forty-acre tracts in question were a part of the real estate owned in common by said Blossom and his sisters in the vicinity of Devil's lake, in this state. All the lands owned by them as such tenants in common in the vicinity of said lake were sixteen forty-acre tracts. These lands appear to have had little value. The evidence discloses that previous to February, 1888, the said Walter L. Blossom, on his own behalf and on behalf of his sisters, had made efforts to sell said lands and the whole of them, and for that purpose said Blossom had employed one Mr. Slye, living in the vicinity of such lands, to make sale thereof. Mr. Slye had up to that time found no purchasers for said lands or any part thereof. Walter L. Blossom resided in Spokane Falls, Washington Territory. In February, 1888, Mr. Blossom came to Baraboo, in the vicinity of said lands, for the purpose of making sale thereof if he could do so. He failed, however, to make any sales, and then placed the lands in the hands of Emery & Shults, real-estate agents at Baraboo, for sale. The evidence tends to show that, before leaving the lands in the hands of said agents for sale, Mr. Blossom endeavored to make sales of the same himself, but did not succeed in so doing.

The evidence shows that Mr. Blossom left with said agents prices at which sales might be made by said agents, but gave to said agents no written power of attorney authorizing them to convey said lands or any part of them to purchasers. In the price-list furnished said agents, the three forty-acre tracts about which this controversy arises were valued together at $500. After the lands were left with Emery & Shults for sale, they placed notices on or near the lands stating that the lands were "for sale by

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D. S. Emery, Baraboo, Wisconsin." These notices were given with the approval and sanction of Walter L. Blossom. After making this arrangement with Emery & Shults, Mr. Blossom returned to Spokane Falls. Emery & Shults immediately made efforts to sell said lands, but were unable to make any sales at the prices fixed by Blossom. On March 9, 1888, said agents wrote to Mr. Blossom, and addressed the letter to him at Milwaukee, stating what had been done, and giving a description of the lands as they had found them from examination, but reporting no sales. On the 14th of March, 1888, the agents wrote another letter addressed to Blossom at Spokane Falls, in which they stated they had had an offer from a Mr. Crouch for the three forty-acre tracts of $300, and that Mr. Kirk would pay $10 more for them in order to keep control of the south end of the lake, although Mr. Kirk said it was more than they were worth. On the 21st of March, Mr. Blossom answered these letters by a letter dated at Spokane Falls. In this letter Mr. Blossom says, "I don't think $300 enough for the three forties;" that he considers the forty on the lake worth $500 to any person who wished to build on the lake; and he says: "I will throw in the other two forties to any one wishing the property. I will sell the property, and take $450 for the three forties, which I think you will be able to get by waiting until summer, if not now. Hoping to hear that you will succeed in getting this figure for it soon, or very nearly it, I am," etc. On the 28th of March, 1888, Emery & Shults again wrote to Mr. Blossom. In this letter they say: "I have seen *Mr. McWhinne*, and I think I can get about $400 for the three forties south of the lake;" and requesting a deed to be forwarded for that tract, leaving the name of the purchaser in blank, and stating that $400 would be a good offer for it. This letter also asked Mr. Blossom to fix a price on the entire sixteen forties, stating that they had a man who wanted the least price on all the forties, and saying: "I think he will give about $900."

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On the 7th of April, Emery again writes to Mr. Blossom, stating that he had written several times about his property and had heard nothing from him; also stating that he had a man who wanted to buy the whole, and again asking him to fix a price on the whole and send a deed for the whole to the Bank of Baraboo, to save time. Letters were also written by Emery & Shults to Blossom on April 11th and 19th, in regard to the sale of these lands, stating what offers they had for the lands, and requesting him to fix a price for the whole of the lands; and on April 30th, the two following letters were written: "[First letter.] Baraboo, Wis., April 30, 1888. W. L. Blossom, Spokane Falls, Washington Ty.— Dear Sir: I have written you several letters in regard to your landed property in our vicinity, and as yet have rec. but one letter. I understand that you have written Mr. Slye about your taxes. I have an offer for all your land. *Mr. Charles Martin* says he will give you $1,000, and if I remember aright that is what you wanted. What do you say in reply? Very truly, EMERY & SHULTS." "[Second letter.] Baraboo, Wis., April 30, 1888. W. L. Blossom, Spokane Falls, Washington Ty.— Dear Sir: *Mr. E. Mc Whinne* has bought your lake property; that is, the three forties south of the lake. We have accepted $50 on the same. This is $125 more than any of the parties at the lake would give. Very truly, EMERY & SHULTS." Witness thinks the letter first above mentioned was written first.

Again, on May 21, 1888, Emery & Shults wrote to Blossom the following letter: "Baraboo, May 21, 1888. W. L. Blossom, Spokane Falls, Washington Ty.— Dear Sir: I wrote you some time ago concerning the sale of the three forty-acre pieces south of lake to *E. Mc Whinne* for $450, your price, and that I had rec. on same $50 as bind money. The balance, viz., $400, is deposited in bank. And I also wrote that *Mr. Charles Martin* had made an offer of $1,000

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for all of the land you own, and have rec. no answer. If desired, and you wish, he (*Martin*) will deed to *Mc Whinne.* Please act on this matter. Send deed to bank (*Mc Whinne*). Very truly, EMERY & SHULTS."

Emery again wrote to Blossom on June 8th. The following is a copy of that letter: "Baraboo, Wis., June 8, 1888. Mr. W. L. Blossom — Dear Sir: You do not seem to be a very prompt man to do business with. It has been nearly three months since I sold your lake property to *E. Mc Whinne*, viz., the east half of the northwest ¼, and the northeast ¼ of the southwest ¼, of sec. 25–11–6, for $450 cash. *Mr. Mc Whinne* has taken possession of same, and intends to hold it. I have $50 in my hands, and the balance is deposited in the Bank of Baraboo, Wis., awaiting deed. Very truly, D. S. EMERY."

No answer to these several letters was sent by Blossom until the 7th of July, 1888. On July 7th, 1888, Mr. Blossom wrote the following letter to Emery & Shults: "Spokane Falls, W. T., July 7, 1888. Emery & Shults, Baraboo, Wis.— Gentlemen: I owe you more than an apology for not answering your valued favors before, as you have shown such a business as well as kindly interest in the handling of our property in your vicinity. In regard to the lake property which *Mr. Mc Whinne* wants, will let him have it in case I cannot sell the whole sixteen forties in a lump, which I much prefer to do. If you can sell them so you can net me twelve hundred dollars, I think there would be good money to the persons buying the land at the figures named. I have just received a letter from Mr. Crouch, asking for particulars in regard to the lands, and will answer him, and refer him to you for any details in the matter. Please see *Mr. Martin*, and perhaps you can sell the whole to him, and, if he does not want it, think you will have no difficulty in finding another customer for the property at that figure. Yours truly, W. L. BLOSSOM."

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On the 13th of July, 1888, Emery & Shults wrote the following letter to Mr. Blossom: "Baraboo, July 13, 1888. Mr. W. L. Blossom, Spokane Falls — Dear Sir: We did rec. a letter from you on the 10th inst. It seems to us that one ought to be a little more prompt in business transactions. You are morally bound to let *Mc Whinne* have the lake property, but I suppose you can do as you please. I have seen *Mr. Martin*, and he has agreed to take you at your offer, viz., $1,200 net to you. What he wants of it is more than I can tell. He certainly can't get his money out of it again, that is, if he expects to sell it. He may trade it in, in that way get something out of it. *Martin* demands an abstract of the title of all the lands, and when it is all right your money is ready for you at the bank of Baraboo. Now, Mr. Blossom, I wish you would be a little more prompt in your business with me than heretofore. There isn't much satisfaction in doing business in a way that one isn't used to. Mr. Crouch called on me, and he thinks he can't stand the pressure. Very truly, EMERY & SHULTS. Will make deed, and send you in a few days. Send on your order for abstract. D. S. EMERY."

On the 18th of July, 1888, Emery & Shults wrote again to Mr. Blossom. The following is a copy of that letter: "Baraboo, Wis., July 18th, 1888. W. L. Blossom, Spokane Falls — Dear Sir: I wrote you on the 13th inst., stating that *Mr. Martin* would take your place. I herewith send deed for same. Mr. Crouch informs me that he will take the place providing you take $200 down, and the balance on time at seven per cent. interest until paid. There is nothing in this offer. He is one of these hangers on. I never have been able to make a single deal with him since I have been in the real estate biz. He (Crouch) has often told me that he would take different pieces, but never succeeded in closing a deal yet. I have lost all confidence in what he says. He wants the land for $1,200, you to pay

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commissions. Hoping that we will be able to bring this matter to a close soon, we remain, very truly, EMERY & SHULTS, Baraboo, Wis."

On July 20, 1888, Mr. Blossom wrote to Emery & Shults the following letter: "Spokane Falls, July 20, 1888. Messrs. Emery & Shults — Gentlemen: Your favor of the 13th inst. is just at hand, and I have executed deed to all lands about Devil's Lake to *Mr. Charles Martin*, and forwarded same to a sister who lives in Detroit for her signature. *Mr. Martin* can easily satisfy himself of the title to our property by an examination of the records, as there have been very few transfers; but, in case he desires an abstract, please have one made, and present voucher for same, together with check for balance to make twelve hundred dollars, and the cashier of the Bank of Baraboo will deliver the deed to you. My sister will forward the deed direct to the bank, from Detroit, and it should not be more than three or four days in arriving. Yours truly, WALTER L. BLOSSOM."

As the result of this correspondence, Blossom and the other owners conveyed all the lands to the defendant *Martin* for the sum of $1,200 cash. Upon the trial, the evidence showed conclusively that *Mr. Martin* had full knowledge of all the facts in relation to the contract of sale of the three forties by Emery & Shults, claiming to be agents of the Blossoms, before he purchased said lands from the said Blossoms.

The evidence shows that after the contract made by *McWhinne* for the purchase of said lands from Emery & Shults, as agents of the Blossoms, he paid $50 on the purchase, and deposited the balance in the bank to await the receipt of the deed. And it also shows that, immediately after making the agreement with said agents, *McWhinne* entered into the possession of the lands described, and made improvements thereon; and the evidence tends to

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show that such possession was known to the agents, and also to the said defendant *Martin* before he purchased said lands of the Blossoms. The evidence also shows that on the 8th of June, 1888, D. S. Emery, as agent of the Blossoms, made a contract in writing with said *E. Mc Whinne* for the sale of said three forties of land. The following is a copy of said contract:

"This agreement made this 8th day of June, 1888, between W. L. Blossom, of Spokane Falls, Washington Territory, party of the first part, *E. Mc Whinne*, of Baraboo, Sauk county, Wisconsin, party of the second part, witnesseth that said first party has sold to said second party, and said second party has purchased, the east half of the northwest quarter, and the northeast quarter of the southwest quarter, of section number twenty-five (25), in township number eleven (11) north, of range number six (6) east, in Sauk county, for the sum of four hundred and fifty dollars, to be paid as follows: $50 down, receipt of which is hereby acknowledged by said first party, and the balance on receipt of a deed of warranty of said land, conveying a perfect title thereto to said second party, free and clear from all liens and incumbrances; such deed to be ready for delivery at the Bank of Baraboo, in Baraboo, Wisconsin, as soon as the same can be procured from Spokane Falls, Washington Territory, where said first party now is, not later than August 1st next. [Signed] W. L. Blossom. Per D. S. Emery, Agent. E. McWhinne."

After hearing all the evidence in the case, the learned circuit judge made the following findings of fact, viz.:

"That on the 21st day of March, 1888, Emery & Shults, real-estate agents of Baraboo, Wisconsin, were the agents of said Walter L. Blossom, of Spokane Falls, Washington Territory, for the purpose of negotiating as to a sale of the lands of said Blossom described in the complaint, authorized to get offers for said lands, and report the same to

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said Blossom; and that prior thereto, and while such agents as aforesaid, they had obtained offers for said land and reported the same to said Blossom. That on the said 21st day of March said Blossom wrote to D. S. Emery, one of said agents, a letter in regard to and referring to said land, in which he states: 'I wish to sell the property, and will take four hundred and fifty dollars for the three forties, which I think you will be able to get by waiting until summer, if not now. Hoping to hear that you will succeed in getting this figure for it soon, or very nearly it, I am yours very truly, W. L. BLOSSOM.'

"That on the 27th day of March, 1888, said agent Emery showed or read said letter to the plaintiff, and said plaintiff at once accepted the offer therein contained, paid fifty dollars towards the purchase price of said lands, deposited the balance in the Bank of Baraboo, to be paid to said Blossom on receipt of the conveyance, and went into possession of said property, and made the improvements mentioned in the complaint.

"That on the 30th day of April said agents, Emery & Shults, notified said Blossom of the said acceptance of the said offer, in a letter written on said day, wherein they say: '*Mr. Mc Whinne* has bought your lake property, that is, the three forties south of the lake. We have accepted $50 on same.' That inclosed in said letter was a deed of said property to be executed by said Blossom, with the consideration therefor filled in, being $450, to *Mc Whinne.*

"That on the 21st day of May said agents, Emery & Shults, wrote to said Blossom a letter in which they state: 'I wrote you some time ago concerning the sale of the three forty-acre pieces south of lake to *E. Mc Whinne* for $450, your price, and that I had rec. on same $50, as bind money. The balance, viz., $400, is deposited in bank. And I also wrote that *Mr. Charles Martin* had made an offer of $1,000 for all of the land you own, and have rec. no answer. If de-

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sired, and you wish, he (*Martin*) will deed to *Mc Whinne*. Please act on this matter. Send *Mc Whinne* deed to bank.'

"That on the 8th day of June, 1888, said Emery, acting as agent for said Blossom, entered into the written contract mentioned and set out in the complaint, with said plaintiff; and on the same day said Emery wrote to said Blossom a letter, in which he states: 'It has been nearly three months since I sold your lake property to *E. Mc Whinne*, viz., the east ½ of the northwest ¼, and the northeast ¼ of the southwest ¼, of sec. 25, T. 11, R. 6, for $450 cash. *Mr. Mc Whinne* has taken possession of same, and intends to hold it. I have $50 in my hands, and the balance is deposited in the Bank of Baraboo, awaiting deed.'

"That said Blossom received all of said letters in due course of mail, but failed and neglected to make any reply thereto, or to send any communication whatever to said plaintiff or to said agents, until the 7th day of July, 1888, when he wrote to said agents a letter, in which he does not in any manner repudiate their authority to act for him, or direct them to rescind their said sale to said plaintiff, and that he never has in any manner notified the plaintiff of any rescission of said contract or repudiation of said sale.

"That said letter of Blossom's dated March 21st, the showing of it by said Emery to the plaintiff, the acceptance of the offer therein contained by the plaintiff, the paying of some portion of the purchase money by the plaintiff, the letters of Emery & Shults above mentioned, the taking possession by the plaintiff of the property and making improvements thereon, and the depositing of the balance of the purchase money by the plaintiff, and the delay of Blossom after being informed what Emery as his agent had done, together with all the facts and circumstances proven, constitute a contract binding on Blossom, and obligating him to convey said lands to the plaintiff.

"That the written contract of June 8th neither added

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anything to, nor took anything away from, the binding force of the contract above mentioned.

"That, prior to the acceptance by the defendant *Martin* of the conveyance of the land described in the complaint to him, the defendant *Martin* had notice of all the facts above mentioned."

The court, upon these findings, adjudged that the plaintiff was entitled to the relief demanded in his complaint, and judgment was entered accordingly, from which judgment the defendant *Martin* appealed to this court. Exceptions were taken by the said defendant *Martin* to all the findings of fact separately. On the trial the learned circuit judge permitted the plaintiff to amend his complaint, so as to make it conform to the findings of fact in the case. To this the defendant *Martin* objected, and alleges it as error in this court.

G. Stevens, for the appellant, contended, *inter alia*, that the trial court erred in receiving or considering evidence of any contract other than the one set up in the original complaint, and in allowing the complaint to be amended after the findings were made, so as to conform to the facts found. The claim of the plaintiff was that on June 8, 1888, Mr. Blossom, acting by Emery as his agent, entered into a written contract for the sale of the land; and the complaint did not show that any other fact was or would be relied upon or proved. And yet the plaintiff recovered upon an entirely different contract. *Shernecker v. Thein*, 11 Wis. 556; *Button v. Schuyler's S. T. B. Line*, 40 Hun, 422; *Johnson v. Filkington*, 39 Wis. 62; *Lewark v. Carter*, 117 Ind. 206; *King v. McKellar*, 94 N. Y. 317; *Nichols v. Larkin*, 79 Mo. 264; *Hanes v. D. & S. E. R. Co.* 40 Ohio St. 95; *Barrett v. Wheeler*, 66 Iowa, 560; *Niagara Co. Nat. Bank v. Lord*, 33 Hun, 557. Emery had no authority to execute the written contract. The trial court correctly found that Emery & Shults were the agents of Blossom for

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the purpose of getting offers for the land and reporting the same to him. That was the extent of their authority. *Hamer v. Sharp*, 44 L. J. Ch. 53; *S. C.* L. R. 19 Eq. 108; *Armstrong v. Lowe*, 76 Cal. 616; *Duffy v. Hobson*, 40 id. 240; *Milne v. Kleb*, 44 N. J. Eq. 378; *Stewart v. Pickering*, 73 Iowa, 652; *Stillman v. Fitzgerald*, 37 Minn. 186. The letter of March 21 did not amount to an offer to sell, which the plaintiff could accept. It was merely private instruction by a principal to his agent. *Haydock v. Stow*, 40 N. Y. 363; *Stewart v. Pickering*, 73 Iowa, 652; *Stillman v. Fitzgerald*, 37 Minn. 186. If it be said that Blossom had ratified what Emery as his agent had done, that could only bind the interest of Blossom himself. Blossom had no power to delegate to any other person the authority he had to act for his sisters. Chitty on Cont. (11th Am. ed.), 296 and note; Parsons on Cont. 82, 83. And there is nothing in any part of the case which professes to bind the interest of either of those sisters.

For the respondent there was a brief by *Grotophorst, Remington & Buckley*, attorneys, and *Olin & Butler*, of counsel, and oral argument by *J. M. Olin*. They argued, among other things: (1) The agents of Blossom had authority to execute the written contract set out in the complaint. The agent who is authorized "to sell" is authorized, not merely to get offers for his principal, but to close a binding bargain for the conveyance of real estate. Mechem, Agency, sec. 321; *Farnham v. Thompson*, 34 Minn. 330; *Johnson v. Dodge*, 17 Ill. 433, 440; *Peabody v. Hoard*, 46 id. 242, 245; *Watson v. Sherman*, 84 id. 263, 267; *Jackson v. Badger*, 35 Minn. 52; *Pringle v. Spaulding*, 53 Barb. 17; *Haydock v. Stow*, 40 N. Y. 363; *Lyon v. Pollock*, 99 U. S. 668; *Matthews v. Sowle*, 12 Neb. 398; *Hopwood v. Corbin*, 63 Iowa, 218. (2) The letter of March 21 contained an offer which, when accepted, bound Blossom. *Hollis v. Burgess*, 37 Kan. 487. (3) There was a valid contract which

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could be specifically enforced, independent of the written contract set out in the complaint. (4) There was a ratification of the acts of the real estate agents. To this point counsel cited, besides the cases referred to in the opinion, *Pratt v. Putnam*, 13 Mass. 361; *Brigham v. Peters*, 1 Gray, 139; *Nichols, Shepard & Co. v. Shaffer*, 63 Mich. 599; *Pitts v. Shubert*, 11 La. 286, 30 Am. Dec. 718; *Lorie v. N. C. C. R. Co.* 32 Fed. Rep. 270; *Cairnes v. Bleecker*, 12 Johns. 300. (5) The acts of the real estate agents were binding not only upon Blossom but upon his two sisters. Ratification by Blossom of the sale by Emery was binding upon Blossom's co-owners; for Blossom himself had authority to make such sale, and the legal effect of ratification of an act is to make it the act of the person ratifying. The authority to employ a sub-agent passed to Blossom in this case by implication. Mechem, Agency, secs. 193, 194, 196; Story, Agency, sec. 210; *Bodine v. Exchange F. Ins. Co.* 51 N. Y. 117; *Renwick v. Bancroft*, 56 Iowa, 527; *Saveland v. Green*, 40 Wis. 432; *Dorchester Bank v. N. E. Bank*, 1 Cush. 177. (6) It was not error to allow the complaint to be amended so as to conform to the facts proven. *Schumaker v. Hoeveler*, 22 Wis. 43; *Gill v. Rice*, 13 id. 549; *Giffert v. West*, 33 id. 621; *Schieffelin v. Whipple*, 10 id. 81; *Pope v. Allis*, 115 U. S. 363; *Patterson v. Keystone Mining Co.* 30 Cal. 360; *Carson v. Railsback*, 3 Wash. 168; *Riggs v. Chapin*, 7 N. Y. Supp. 765; *Abernathy v. Seagle*, 98 N. C. 553; *Engel v. Hardt*, 56 Wis. 456.

TAYLOR, J. The contention of the learned counsel for the appellant is that upon the whole evidence there was no binding contract of sale made by the Blossoms to the said plaintiff before and at the time the defendant *Martin* purchased said lands from them, and that he is not, therefore, bound in equity to convey said lands to the said plaintiff on the payment of the balance due on his alleged contract

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with said Blossom, viz., $400, as adjudged by the circuit court. The learned counsel for the respondent have made a very able argument upon the evidence to establish the proposition of law that there is evidence sufficient in the case to show that the said Emery & Shults were agents of the Blossoms, with full power to make a binding written contract of sale of said lands, and especially to make such binding contract of sale at the price or prices fixed by the said W. L. Blossom. We think, after a careful consideration of the case and the findings of the court, that that question is not in the case to be determined on this appeal. The learned circuit judge has found as a fact that W. L. Blossom did not confer any such power upon the said Emery & Shults; that they were his agents for the purpose of negotiating as to a sale of the said lands, authorized to get offers for said lands and report the same to said Blossom; and he also finds that the written contract, made June 8, 1888, neither added anything to, nor took anything away from, the binding force of the contract which the learned judge finds was made by the other evidence in the case. As there were no exceptions taken to these findings by the plaintiff, they are conclusive upon him upon this appeal. The learned circuit judge based his judgment upon the ground that the evidence established a contract for the sale of said lands to the plaintiff, irrespective of the written contract made June 8, 1888, and we think we must either affirm or reverse the judgment upon that view of the case.

After a careful consideration of the evidence in the case, we conclude that the findings of the learned circuit judge are sustained by the law and the facts. We think it could not be successfully controverted that if W. L. Blossom, the acknowledged agent of the Blossoms, had personally made the same contract with the plaintiff which the said Emery & Shults made with him, he would have been bound in equity to make a conveyance of said lands to said plaint-

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iff. This court, as well as nearly all other courts, has held that equity will enforce a verbal contract for the sale of real estate when there has been a part performance of such contract on the part of the vendee. And our statute, after declaring the nullity of such verbal contracts, expressly provides that nothing in the statute shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance of such agreements. See 1 S. & B. Ann. Stats. sec. 2305. What is such a part performance of a verbal contract as will take it out of the statute and will justify a court of equity in decreeing a specific performance of such contract, has been frequently considered by this court, and it is held that the payment of any considerable part of the purchase money, and entering into the possession of the purchased premises and making improvements thereon, are sufficient to take the case out of the statute and justify the enforcement of the contract. *Bowen v. Warner*, 1 Pin. 600; *Blanchard v. McDougall*, 6 Wis. 167; *District No. 3 v. Macloon*, 4 Wis. 79; *Fisher v. Moolick*, 13 Wis. 321; *Ingles v. Patterson*, 36 Wis. 373; *Smith v. Finch*, 8 Wis. 245; *Cameron v. Austin*, 65 Wis. 652; *Seaman v. Aschermann*, 51 Wis. 678, 682. We think the evidence in this case clearly brings the plaintiff within the rule laid down in the above-cited cases, and the only other question in the case is whether W. L. Blossom, the acknowledged agent of the owners of said lands, should be held bound by the contract made by Emery & Shults with the plaintiff.

Admitting, as the court finds, that Emery & Shults had originally no authority to bind Blossom by a contract to sell said lands to the plaintiff, has Blossom so conducted himself in regard to the contract made by Emery & Shults with the plaintiff as to estop him from now repudiating such contract? In other words, has he ratified said contract and made it his own? In determining this question,

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we are bound to give weight to the fact that the said Emery & Shults were not entire strangers in their relations to said Blossom, or in their relations to the lands in question. The proofs show that Blossom had employed them to procure purchasers for said lands, and this fact was made known to the public generally. What the extent of their authority was, was not definitely stated or known. The plaintiff dealt with these agents, supposing they had authority to sell said lands to him. At most, there was an excess of authority on the part of the agents in making the contract in question. Under such circumstances, we think the law is clear that when the person for whom such agents have undertaken to act is fully notified of what they have done, it becomes the duty of the principal either to affirm or disaffirm the act of the supposed agent within a reasonable time after such notice, or he is bound by such act. In the case at bar the evidence is clear that Blossom was notified at least two months before he sold the lands to the said *Martin* of the contract made by Emery & Shults with the plaintiff, and that plaintiff had taken possession of the property under such contract, and that he claimed the right to enforce such contract against the Blossoms, and that after the receipt of this notice Blossom did not in any way notify said plaintiff that he would not perform the same, and afterwards conveyed the lands to the said *Martin* without any notice to the plaintiff that he repudiated the contract made with the plaintiff. Under the authorities, we think Blossom is estopped now from denying the authority of the said Emery & Shults to make said contract, and has bound himself to its performance to the same extent that he would have been bound had he made such verbal contract with the plaintiff in person. The following cases in this court fully sustain the conclusion we have arrived at on this point: *Ladd v. Hildebrant*, 27 Wis. 135; *Saveland v. Green*, 40 Wis. 431, 438; *Kercheval v. Doty*, 31 Wis. 493; *Hadfield*

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v. Skelton, 69 Wis. 460, 463, 464. Upon this point, see, also, *Foster v. Rockwell*, 104 Mass. 167, and *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385, and other cases cited in the brief of the learned counsel for the respondent.

It is urged by the learned counsel for the appellant that the circuit court erred in allowing the plaintiff to amend his complaint so as to make it conform to the evidence. We think this is a matter resting entirely in the discretion of the trial court, and, unless there is a clear abuse of such discretion, this court will not interfere. In this case it is not very clear that the evidence introduced on the trial was not properly admissible under the original complaint.

The other objection made, that W. L. Blossom could not delegate his power as agent of his co-tenants to the said Emery & Shults, is not in the case in the view taken of it by the trial court. The trial court enforced the contract against the grantee of the Blossoms, on the ground that Blossom, their authorized agent, had made a valid contract to convey the same to the plaintiff; and, the proof showing clearly that their grantee, *Martin*, took the conveyance from the Blossoms with full knowledge of the fact that such previous contract of sale had been made, he was also bound by such contract as between himself and the plaintiff.

By the Court.—The judgment of the circuit court is affirmed.

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CRIBB, Respondent, vs. HIBBARD, SPENCER, BARTLETT & Co. and others, Garnishees, Appellants.

May 23 — June 21, 1890.

Debtor and creditor: Voluntary assignment: Chattel mortgages: Assignment of accounts.

1. A chattel mortgage of a stock of goods was given by a firm to secure an indebtedness a part of which had a few days before been assigned to the mortgagee by another creditor. The mortgage was subject to a prior one given to another creditor who was in possession of the property. There was no collusion between the mortgagees, each of whom in taking security acted for himself alone. The second mortgage did not cover the individual property of the partners, and it did not appear that it covered all of the firm property. *Held*, that it was not an assignment for the benefit of creditors within the meaning of sec. 1694, R. S.
2. Nor did an assignment of the ledger accounts of the firm to the second mortgagee as further security for the debt, whether considered by itself or in connection with the mortgage, bring the transaction within said section.

APPEAL from the Circuit Court for *Sauk* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The firm of Hagenahs & Geffert, composed of Geffert and John H. and Peter Hagenah, was in business, dealing in hardware, agricultural machinery, etc., from June, 1874, to January, 1883, when it was dissolved. In January, 1883, the firm of J. & P. Hagenah, composed of J. H. and Peter Hagenah, was formed, and carried on a similar business from January, 1883, to July 8, 1889. June 28, 1888, the said J. & P. Hagenah executed two promissory notes, each payable to *Hibbard, Spencer, Bartlett & Co.* (a corporation organized under the laws of Illinois) or order, one for $5,000 and interest, and the other for $3,226 and interest, each accompanied by a warrant of attorney authorizing the entry of judgment thereon. July 1, 1889, the said firm of J. & P.

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Hagenah was indebted to sundry persons in a large amount in addition to said *Hibbard, Spencer, Bartlett & Co.* in the sum of $9,310.36, and Cribben, Sexton & Co., $471.81. July 3, 1889, said John H. Hagenah received a letter from one Stoddard, the credit man of *Hibbard, Spencer, Bartlett, & Co.*, from Chicago, to the effect that he would soon be at Reedsburg, and was going to help him (Hagenah) out of the bush. July 3, 1889, the said Cribben, Sexton & Co. sold, assigned, and transferred their said indebtedness and account against the said firm of J. & P. Hagenah to said *Hibbard, Spencer, Bartlett & Co.* July 5, 1889, the said John H. Hagenah went to Chicago, to see *Hibbard, Spencer, Bartlett & Co.*, and did see them and said Stoddard on Saturday, July 6, 1889, and was then and there informed by said Stoddard, in effect, that he would be in Reedsburg on the following Monday evening, and would help him out of the bush. John H. Hagenah thereupon returned to Reedsburg on Sunday morning, July 7, 1889.

On Monday morning, July 8, 1889, the said John H. Hagenah informed the firm of Morse, Winchester & Keith, known as the Citizens' Bank of Reedsburg, of his trip to Chicago, his indebtedness to *Hibbard, Spencer, Bartlett & Co.*, and the fact that he expected one of their men at Reedsburg that day. Thereupon John H. & Peter Hagenah executed to the said Citizens' Bank a note for $3,500, and a chattel mortgage upon their entire stock of hardware, machinery, tinware, and all stock of every description on the premises described, to secure the same, which note and chattel mortgage was given as a renewal of a similar note and mortgage given by them, but not filed, about two weeks before. After the delivery of such mortgage to the Citizens' Bank, and the filing of the same, the said Citizens' Bank thereupon took possession of the mortgaged property. Upon the evening of the same day said Stoddard came to Reedsburg from Chicago, and, after ascertaining the situ-

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ation, and that the Citizens' Bank had obtained and filed said chattel mortgage, he thereupon obtained from the said J. & P. Hagenah a note executed by them, dated on that day, payable to *Hibbard, Spencer, Bartlett & Co.* or order, for $9,787.17 with interest at eight per cent., secured by chattel mortgage, duly filed, on the same property described in the mortgage to the Citizens' Bank. On the same evening the said Stoddard obtained from the said J. & P. Hagenah an instrument in writing, of which the following is a copy: "ASSIGNMENT OF ACCOUNTS. For value received, we do hereby sell, assign, and transfer unto *Hibbard, Spencer, Bartlett & Co.*, of Chicago, Ills., all the accounts contained in this ledger, covering accounts due us. J. H. HAGENAH. PETER HAGENAH. Dated July 8, '89." July 9, 1889, the several insurance policies on said mortgaged property were assigned by said J. & P. Hagenah to *Hibbard, Spencer, Bartlett & Co.* and the Citizens' Bank, mortgagees in possession. At the several dates of July 9, 10, and 15, 1889, the said John H. and Peter Hagenah, respectively, gave deeds of their individual property to their individual creditors.

July 20, 1889, the plaintiff commenced this suit against John H. and Peter Hagenah. August 5, 1889, the said *Hibbard, Spencer, Bartlett & Co.* was summoned as garnishee in said action. August 13, 1889, the said *Hibbard, Spencer, Bartlett & Co.* answered said garnishee, and denied any and all indebtedness to the said J. & P. Hagenah, and also denied having in its possession any property belonging to them. August 17, 1889, the plaintiff took issue on said garnishee answer. August 19, 1889, the plaintiff recovered judgment by default against the said John H. & Peter Hagenah for $868.41.

Upon the trial of said garnishee action, and under the direction of the court, the jury found in effect as matters of fact (1) that the property so covered by the chattel mortgage so given to said Citizens' Bank was sold by them under

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the stipulation on file for the sum of $3,900; (2) that said Citizens' Bank, before the sale mentioned, sold a part of said mortgaged property to the amount of $125, of which $81.37 was received by them in cash; (3) that said Citizens' Bank incurred expenses on account of the seizure, custody, and sale of said mortgaged property to the amount of $107.51; (4) that said Citizens' Bank was entitled to interest on the mortgage debt, amounting to $44.34; (5) that said *Hibbard, Spencer, Bartlett & Co.* had collected upon the ledger accounts so assigned to it the sum of $533.87, and that for $333.24 thereof it had taken promissory notes from the persons from whom such accounts were due; (6) that said chattel mortgage to said Citizens' Bank was and is a valid security, and the mortgagees therein were entitled to hold the proceeds of the mortgaged property so sold for the amount of their debt, interest, and expenses, as above found, less the amount of sales made by them prior to the final sale, to wit, for the sum of $3,526.85, and that the balance of said $3,900, being $373.15, should be paid into court, to be disposed of as the judgment therein should provide; (7) that the said chattel mortgage so given to *Hibbard, Spencer, Bartlett & Co.*, as well as the assignment of the accounts of the firm of J. & P. Hagenah to said corporation, was made for the benefit thereof, and for the benefit of the firm of Cribben, Sexton & Co. to the amount of $476.81, being the accounts so assigned by them to said corporation, and that said mortgage and assignment were and are fraudulent and void, as being in effect an assignment for the benefit of creditors, not executed as prescribed by law; that said *Hibbard, Spencer, Bartlett & Co.* was chargeable as such garnishee for and on account of said $373.15, and for and on account of said book-accounts so assigned to it as above found, and for the collections realized therefrom and the promissory notes taken on account thereof; that the said Citizens' Bank was in no manner chargeable as garnishee in the action.

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Thereupon judgment was entered against the said *Hibbard, Spencer, Bartlett & Co.*, as such garnishee, for the said sum of $533.87, and $373.15, making $907.02, and the same was thereupon directed to be paid over to the receiver appointed in said action, and by him to be thereupon paid as therein directed. From that part of said judgment in favor of the plaintiff and against the said *Hibbard, Spencer, Bartlett & Co.*, said corporation appeals.

G. Stevens, attorney, and *William F. Vilas*, of counsel, for the appellant.

S. U. Pinney and *A. L. Sanborn*, for the respondent.

CASSODAY, J. There is no statute in this state preventing any failing or insolvent debtor from paying or securing one or more of his creditors in preference to others, except as provided in ch. 349, Laws of 1883, and ch. 451, Laws of 1887, being sec. 1693*a*, S. & B. Ann. Stats. Those acts avoid certain securities and liens obtained in the ordinary way only when the debtor makes an assignment for the benefit of his creditors within sixty days after giving the securities or liens. To preserve such preferences, it is only necessary for the debtor to refrain from making such assignment during the sixty days mentioned, and this he will always do when he really desires to continue such preference. Since such is ordinarily his desire, the provisions for avoiding such securities and liens are very seldom available, and hence are of very little practical value. It is true that except for the wages of laborers, servants, and employees, the act of 1883 avoids "any and all assignments" thereafter "made for the benefit of creditors," which "contain or give any preference to one creditor over another creditor;" but that is only operative when such preference is contained or given *in the assignment itself*, and then its effect is to wholly avoid such assignment. While the debtor is thus precluded from giving any such preference in or by any such assign-

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ment, yet by refraining from making any such assignment he is otherwise left as free to give such preferences as at common law. This may work serious mischief in certain cases, but courts are not at liberty to make or alter statutes, but are bound so far as possible to enforce them.

The statutes also provide that "all *voluntary* assignments or transfers whatever of any real estate, chattels real, goods or chattels, rights, credits, moneys, or effects, *for the benefit of or in trust for creditors*, shall be void as against the creditors of the person making the same, unless the assignee shall be a resident of this state," and the assignment is executed as therein required. Sec. 1694, R. S. It is only such "voluntary assignments or transfers" as are made to a nonresident assignee, or as are not thus executed, or as contain or give such preference, which thus come under the condemnation of the statute; but all such voluntary assignments or transfers are thereby expressly prohibited. Thus, in *Winner v. Hoyt*, 66 Wis. 227, the debtors transferred *all* their firm and individual property not exempt, by means of six chattel mortgages and five assignments, running to five different creditors, and all given at substantially the same time, in pursuance of the same agreement, for the same common purpose, and in relation to the same subject-matter, with the understanding and intent that one of such creditors, for himself and as agent or trustee for the others, should take immediate possession, which he did, and then convert the same into money and divide the same *pro rata* among such favored creditors, and with the expectation and intent on the part of the debtors that in case of any surplus the same would go to the unsecured creditors; and it was held that, under the circumstances mentioned, such eleven written instruments should be construed together as constituting but one instrument in law, and that when so construed they were in legal effect a voluntary assignment or transfer within the meaning of the statute cited.

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The principles of that decision have since been expressly sanctioned by other courts of high authority. *White v. Cotzhausen*, 129 U. S. 341; *Richmond v. Mississippi Mills*, 52 Ark. 30; *Putney v. Freisleben*, 11 S. E. Rep. (S. C.), 337; *Straw v. Jenks*, 43 N. W. Rep. (Dak.), 944; *Bonns v. Carter*, 20 Neb. 566; *S. C.* 22 Neb. 495–517; *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 591. Some of these cases were under statutes which avoided the preference, merely leaving the transaction to stand as a valid assignment for the benefit of all creditors. Such statute may be preferable to ours, which under certain circumstances requires the courts to avoid a preference desired and made by a debtor in order to enforce a preference against the will of such debtor. The facts in some of these cases were much less favorable to holding the transaction to be in effect a voluntary assignment for the benefit of creditors, than in *Winner v. Hoyt*, *supra*.

The facts in that case were peculiar, as already indicated, and such as inevitably led to the conclusion there reached. That conclusion was so reached on the theory that a court of equity was bound to regard the substance, object, and effect of the whole transaction when taken together, rather than the mere form of the details resorted to in order to evade the condemnation of the statutes. Attempts have since been made to apply the principles of that case to some of such details when standing alone. Thus in *Hoey v. Pierron*, 67 Wis. 262, a failing debtor executed four chattel mortgages upon his stock of goods to his wife and two other persons respectively, who thereupon took possession and proceeded to sell the goods under the mortgages in the ordinary way, but it did not appear that the mortgages covered all of the debtor's property, and there was no assignment of any accounts, assets, or things in action, nor intent to defraud, nor any trust relation; and, distinguishing *Winner v. Hoyt*, it was held in effect that the transac-

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tion did not constitute a voluntary assignment within the meaning of the statute cited, and was therefore valid as against attaching creditors. In *Chicago Coffin Co. v. Maxwell*, 70 Wis. 282, an attorney at law having in his hands for collection several claims against insolvent debtors, and in consideration of an extension of the time of the payment thereof, obtained from them a note for the amount of such claims, secured by a chattel mortgage upon most of their property, both running to himself, for the benefit of such creditors, but without his knowing that such debtors were then insolvent or owed other debts; and, following *Carter v. Rewey*, 62 Wis. 552, and distinguishing *Winner v. Hoyt*, it was held that the transaction did not amount to an assignment for the benefit of creditors within the meaning of the statute cited, and hence was valid. In *Menzesheimer v. Kennedy*, 75 Wis. 411, each of two creditors, knowing his debtor to be insolvent, obtained a chattel mortgage on substantially all the debtor's property not exempt to secure such debt, and in the absence of any evidence of fraud it was held that the transaction did not constitute a voluntary assignment within the meaning of the statute cited, and was therefore valid. To the same effect is *Stevens v. Breen*, 75 Wis. 595. Similar rulings have been made in other courts: *Gage v. Parry*, 69 Iowa, 605; *Fecheimer v. Robertson*, 13 S. W. Rep. (Ark.), 423.

In the absence of fraud the statute expressly authorizes security by way of chattel mortgages. Sec. 2314, R. S. The mere fact that a debtor is insolvent does not prevent his creditor from obtaining from him such security in good faith. Such chattel mortgage is little more than a mere pledge of the property mortgaged for the security of the debt. Whatever remains of such property after the payment of such debt reverts to the debtor, and becomes subject to the payment of other debts. The transaction is wholly between the parties to the mortgage, and is in no

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sense for the benefit of and in trust for other creditors. A voluntary assignment for the benefit of or in trust for creditors is for a different purpose; and creates different relations. Since the right to give and obtain such chattel mortgages by way of security is expressly given by statute, the other provisions of the statutes cited, which avoid "all voluntary assignments or transfers . . . for the benefit of or in trust for creditors," when not made as therein prescribed, cannot fairly be construed as including such chattel mortgages. The mortgage in question did not cover the property of the individual members of the firm; nor does it appear that it covered all the firm property. Such being the law, there would seem to be no question upon the undisputed facts in the record but what *Hibbard, Spencer, Bartlett & Co.* had the legal right to obtain the mortgage in question in the manner stated, to secure their indebtedness against the firm. That mortgage was taken subject to the one to the Citizens' Bank, which firm was in possession of the mortgaged property at the time. There was no collusion between that bank and *Hibbard, Spencer, Bartlett & Co.*, each of which, in the matter of taking such securities, acted independently and for itself. The insurance policies were manifestly assigned to such mortgagees to keep them in force. The account due Cribben, Sexton & Co. had been sold, assigned, and transferred to *Hibbard, Spencer, Bartlett & Co.* five days before, and to all appearances thereupon became the sole property of the latter. There seems to be no valid objection to that mortgage when considered by itself.

It only remains to be considered whether, after having obtained and filed the chattel mortgage, the taking of an assignment of the ledger accounts, as further security for the same indebtedness, rendered the whole transaction, or even such assignment of the ledger accounts, a voluntary assignment or transfer for the benefit of or in trust for

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creditors, within the meaning of the statutes cited. Such assignment of that account for such a purpose was very much in principle like the delivery of a chattel or a pledge to secure a debt, and certainly was not within the statute of frauds. *Bank of River Falls v. German Am. Ins. Co.* 72 Wis. 538. Whether such assignment and the mortgage are considered together, or the assignment of the account is considered separately, there are manifestly absent from the transaction several elements which were present in *Winner v. Hoyt.* Some of these have been considered by this and other courts. Thus in *Landauer v. Vietor*, 69 Wis. 441, the attachment suit was advised and instigated by the insolvent debtors, but it was said by Mr. Justice LYON, in behalf of the court: "In the present case the debtors did not dispose of all their property by consenting to the attachment suits. Neither was it all seized by virtue of such attachments, or sold upon the executions issued upon the judgments thereafter obtained. The record in the action for a dissolution of the partnership shows that there still remained a large amount of outstanding obligations due the debtors, not disposed of by them, and not interfered with by the attaching creditors, but which remained subject to be applied by the court as required by law. Neither was any trustee for the parties provided for or appointed. In these material particulars the case differs from that of *Winner v. Hoyt*, and they take it out of the rule of that case."

In *Ingram v. Osborn*, 70 Wis. 195, the insolvent debtor sold and assigned to one of his creditors a partly executed contract, being all the property he had, and, distinguishing *Winner v. Hoyt*, it was held that the transaction was not a voluntary assignment for the benefit of creditors within the meaning of the statutes. By way of quotations from standard text-writers, it was there, in effect, said: "Voluntary assignments for the benefit of creditors are transfers,

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without compulsion of law, by debtors, of some or all of their property to an assignee or assignees, in trust, to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor: . . . There must be a trust, a trustee, creditors, and *cestui que trust*, who can compel an enforcement of the trust, in order to constitute an assignment for the benefit of or in trust for creditors."

To a similar effect are *Greene & Button Co. v. Remington*, 72 Wis. 648, 654; *Peninsular Stove Co. v. Sacket*, 74 Wis. 526; *Farwell v. Nilsson*, 24 N. E. Rep. (Ill.), 74. Mr. Burrill says: "A voluntary assignment for the benefit of creditors implies a trust, and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of creditors. . . . Unless a trust is thereby created *by the assignor in favor of creditors*, such conveyances are not within the class of instruments known as assignments for creditors. It is not essential, however, that a trustee should be named *as such* in the instrument." Burrill, Assignm. § 3. In *Fecheimer v. Robertson*, 13 S. W. Rep. (Ark.), 423, *Winner v. Hoyt* is expressly distinguished, and it was said: "In this cause there was no agreement or arrangement, express or implied, for a trustee. The first two creditors were present by their attorney, and a delivery to him was a delivery to them. They were not accountable to any other creditor, under the terms of the deed or agreement of the parties, for any part of the money received from sales of property. When they received enough to satisfy their claims, they delivered all remaining property to the creditors named in the third deed, and they in turn represented all the indebtedness of Johnson & Bolick, and are not answerable to any one for the proceeds of sales, except to the mortgagors." In *Gage v. Parry*, 69 Iowa, 605, it was held, in effect, that where an insolvent firm executed three several chattel mort-

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gages to three creditors, respectively, and also assigned certain book accounts to a fourth creditor, all with a *bona fide* intention of securing such particular creditors, respectively, the transaction did not operate as an assignment for the benefit of creditors, and the mortgages were therefore valid.

We must hold, upon principle as well as authority, that neither the assignment of the ledger account in question, when taken by itself, nor in connection with the chattel mortgage, brings the case within the principle of *Winner v. Hoyt*, or renders the transaction a voluntary assignment or transfer for the benefit of or in trust for creditors within the meaning of the statute.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to this opinion.

MACKEY and others, Respondents, vs. MICHELSTETTER and others, imp., Appellants.

May 23 — June 21, 1890.

Debtor and creditor: Equity: Fraudulent conveyance: Adequate remedy at law: Execution: Attachment: Priority of liens.

Chattels which had been mortgaged by a debtor were attached in an action by an unsecured creditor, and were afterwards sold under an execution on a judgment in favor of another unsecured creditor, who himself purchased the goods at such sale. The proceeds of the sale were in the hands of the sheriff. *Held*, that an action in equity could not be maintained by said judgment creditor and the sheriff to have the mortgages declared void or to restrain the prosecution of an action by one claiming under said mortgages against the sheriff for a conversion of the goods. The remedy at law was adequate. The judgment creditor might, under sec. 2610, R. S., become a party to the action for a conversion and therein attack the validity of the mortgages; and the priority of the liens of the different creditors might be determined by the court on motion.

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APPEAL from the Circuit Court for *Chippewa* County.

Action to set aside, and to have declared null, void, and fraudulent as to creditors, three chattel mortgages executed by the defendant *Henry Michelstetter* to the defendants *Morris Michelstetter*, *Arthur Michelstetter*, and *T. J. Cunningham*, respectively, and a sale of the property under said mortgages to the defendant *Morris Michelstetter*, and to enjoin said *Morris Michelstetter* from prosecuting an action against the plaintiffs *Weiner* and *Guyon* (the sheriff and his deputy) for a conversion of said property, which had been sold by them under and by virtue of an execution issued upon a judgment in favor of the plaintiff *Mackey* and against the defendant *Henry Michelstetter*. The plaintiff *Mackey* was himself the purchaser at said execution sale. The defendants Jansen, McClurg, and Smith are creditors of *Henry Michelstetter*, the mortgagor, and had attached the property in question after the execution of the mortgages and the sale thereunder to *Morris Michelstetter*, and before the issuance of the execution in favor of the plaintiff *Mackey*. A part of the relief demanded is that the lien of said attaching creditors be determined, either as prior to that of the plaintiff *Mackey* or as subject thereto. Other facts stated in the complaint will sufficiently appear from the opinion.

The defendants the *Michelstetters* and *Cunningham* demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and appealed from an order overruling such demurrer.

For the appellants there was a brief by *D. Buchanan, Jr.*, and oral argument by *S. N. Dickinson*.

For the respondents there was a brief by *Griffin & Walmsley*, and oral argument by *H. B. Walmsley*.

COLE, C. J. The demurrer to the complaint should have been sustained for this reason, if no other, that the plaintiff had a complete and adequate remedy at law and there was

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no necessity for invoking the jurisdiction of a court of equity to protect his rights. He claims to be a creditor of *Henry Michelstetter*. He has obtained a judgment on his debt, has issued an execution on his judgment under which the sheriff seized and sold the personal property which the judgment debtor had previously mortgaged to the creditors named. The action proceeds on the assumption that these chattel mortgages are fraudulent and void as to the other creditors of the mortgagor. The plaintiff asks the intervention of a court of equity to declare them void and fraudulent as to such creditors. But what is the necessity for such an adjudication? If these chattel mortgages are void as to such creditors, they are certainly open to an attack on that ground in an action at law. The correctness of this view cannot be successfully denied. Why, then, resort to equity to obtain a decree adjudging the chattel mortgages null and void as to creditors, when, if such is their character, they constitute no obstacle whatever to the creditors' collecting their debts by the usual legal process? Indeed, the complaint shows that the plaintiff *Mackey* disregarded these mortgages, and has caused the mortgaged property to be sold on an execution, and that his co-plaintiffs hold the proceeds of the sale as sheriff and deputy sheriff. It is surely not necessary that there be a judgment declaring that the lien of the attaching creditors on the fund is prior in right and superior in equity to the lien of the chattel mortgages. The contest between the different creditors, as to whom the fund belongs to, can be determined on a motion by the court. *McDonald v. Allen*, 37 Wis. 108; *Allen v. Beekman*, 42 Wis. 186. There is no necessity for a decree declaring the priority of the liens. But besides, it appears that one of the mortgagees has commenced an action of trover against the sheriff and his deputy for the value of the property seized and sold under the execution. Why cannot *Mackey* apply to be made a party defendant

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to that suit under sec. 2610, R. S., when he will be in a position to directly attack the validity of the plaintiff's title, which is involved in that action? For it is evident that *Morris Michelstetter's* right to the property in question will turn upon the validity of his chattel mortgage and the legality of the sale made under it. As a part of the relief demanded in this suit, the plaintiff asks that *Morris Michelstetter* be perpetually enjoined from prosecuting an action of trover for the value of the property which the officers sold upon the execution. But we are at a loss to know upon what ground or principle a court of equity will grant such relief. If *Morris Michelstetter* had a good title to the mortgaged property, he is entitled to recover its value. But, if his title is founded upon an instrument which is fraudulent as to the mortgagor's creditors, it can be impeached and defeated in the trover action.

In any view which we have been able to take of the case, we see no necessity for bringing this equitable action. The questions as to the validity of the chattel mortgages, and of the rights of the parties under them, can be fully litigated and determined in the common-law action pending. There are no special circumstances stated which render a resort to equity requisite and necessary to protect the parties' rights. It is suggested that the plaintiff *Mackey* may be compelled to stand by and see questions involving his right to the property litigated in the trover action to which he is not a party. But, as we have said, he can become a party to that suit on application and showing to the court that he is interested in the subject matter of the controversy. This is very clear. The authority given the court by sec. 2610, above referred to, is ample for the purpose. It is said a court of equity may be invoked to remove conveyances and transfers which cloud the title of personal property. Concede that to be so, but what occasion is there for invoking such jurisdiction here? The remedy at

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law is plain, adequate, and complete. There is no obstruction in the way of the creditors seizing the mortgaged property on execution, as the complaint shows. The property was in fact seized and sold in the ordinary way. The contest now is, Who owned the property at the time it was so seized and sold? A court of law is entirely competent to settle that question, and is the proper forum to decide it, where there can be a trial by jury. It is said the facts stated make a case of fraudulent transfer by an insolvent debtor, within the decision of *Winner v. Hoyt*, 66 Wis. 227. Assume, for the purposes of the case, that this is so, yet why should the plaintiff resort to equity, when the pending action of trover affords a complete and perfect remedy to settle that and all other questions affecting the title to the property in dispute? An adjudication in that case as to the validity of the mortgages will be final and conclusive between the parties.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

HOFFMAN and another, Respondents, vs. CHIPPEWA COUNTY, Appellant.

May 23 — June 21, 1890.

Publication of list of unredeemed lands sold for taxes: Agreement for less than statutory compensation: Estoppel.

Where the number of descriptions in the list of unredeemed lands sold for taxes is less than three thousand, the printer publishing such list is entitled to the compensation prescribed by sec. 1174, R. S., even though he agreed to publish the same at a less rate.

APPEAL from the Circuit Court for *Chippewa* County.

Action to recover the sum of $855 for the publication, in the manner prescribed by law, of a list containing 2850

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descriptions of unredeemed lands which had been sold for taxes. The answer admits the publication, but alleges that it was made by the plaintiffs under a contract with the county clerk by which the plaintiffs agreed to publish such list for the sum of three cents for each description; that, but for the offer of the plaintiffs to publish the list at said rate, the clerk would have caused it to be published in a newspaper other than that of the plaintiffs; and that the plaintiffs are estopped from questioning the validity of said contract. The answer further admits an indebtedness of $85.50 to the plaintiffs for such publication, but denies that the county is indebted to the plaintiff in any further sum on account thereof.

The defendant appeals from an order sustaining a general demurrer to the answer.

T. J. Connor, for the appellant, as to the right of the county clerk to make the contract for less than the statutory compensation, cited *State ex rel. Huse v. Dixon Co.* 24 Neb. 106.

For the respondents there was a brief by *Dickinson & Buchanan*, and oral argument by *S. N. Dickinson.*

Cole, C. J. The learned circuit court sustained the demurrer to the answer of the defendant on the ground that the statute provided, when the number of descriptions in the list was less than 3,000, the printer publishing it should receive thirty cents for each lot or tract in the list, and that this was controlling. The language of the statute is certainly clear and explicit on the subject. It is even mandatory in form, and says that "the printer who shall publish the list and notice of the time when the redemption of lands sold for the nonpayment of taxes will expire *shall receive thirty cents for each lot or tract of land in such list, for all the insertions.*" R. S. sec. 1174. Thus the statute expressly prescribes the fees which the printer shall receive,

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and the county clerk had no authority to make a contract which changed them. The statute, indeed, does not give the clerk any power to contract for the publication of the list where the number of descriptions in the list does not exceed 3,000. He is required to cause the list to be published as the statute prescribes (sec. 1170),— that is, he can select or designate the paper, but the compensation for the service has been fixed by the legislature. But, when the number of descriptions in the advertised list exceeds 3,000, then the county clerk is required to let by contract the publication to the lowest bidder, in the same manner and with like conditions and limitations as the county treasurer is authorized to contract for the publication of list of lands for delinquent taxes for sale. Sec. 1173.

In the case at bar, it is insisted that the contract which the clerk attempted to make with the plaintiffs amounted to nothing more than the designation of the paper in which the list should be published, but did not bind or compel the plaintiffs to do the work for less than the fees fixed by law. The principle of law relied on is that, when the compensation of a party performing services for the state is fixed by statute, it cannot be reduced by the officer or person by whom he is employed; and, since here the statute expressly declares that the printer shall receive thirty cents for each lot or tract of land in the advertised list, the compensation could not be diminished by any arrangement or contract which the county clerk might make in respect thereto. This contention of counsel is sustained by a number of well-considered decisions. *Goldsborough v. U. S.* Taney's Dec. 80; *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38; *People ex rel. Ryan v. French*, 91 N. Y. 265; *Kehn v. State*, 93 N. Y. 291; *Riley v. Mayor*, 96 N. Y. 331. The following cases have likewise a bearing on the question we are considering: *Beal v. St. Croix Co.* 13 Wis. 500; *State ex rel. Newell v. Purdy*, 36 Wis. 213; *State v. Mayor*, 15 Lea, 697;

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Edmondson v. Jersey City, 48 N. J. Law, 121. We have already stated that the clerk had no power to enter into any contract for the publication in this case. He was only authorized to select the paper in which the publication should be made.

The only doubt I have had in the case grows out of this fact: The answer shows that the plaintiffs filed with the county clerk an offer in writing to print the delinquent list in their paper for three cents for each description, and tendered a bond for the faithful performance of the work. On the good faith of this offer or proposition the clerk doubtless entered into the contract which he made with them. While it is clear that he had no authority in law to make such a contract, still I have had some doubt whether they were not bound to stand by the proposition which they made. It is true this was for much less than the rate of compensation fixed by the statute. But could they not waive a provision for their benefit? And, having voluntarily done so, is not the offer or proposition binding upon them? But to this view it is answered that the doctrine of waiver or estoppel has no application to the case, and cannot be invoked to aid the defendant county; that the law does not sanction the principle that an officer shall make a contract to reduce the compensation fixed by statute for services. In some of the cases above cited the facts showing waiver were quite as strong as in this case, but the courts gave no effect to them. In *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38, it is said: "There is no principle upon which an individual appointed or elected to an official position can be compelled to take less than the salary fixed by law. The acceptance and discharge of the duties of the office after appointment is not a waiver of the statutory provision fixing the salary thereof, and does not establish a binding contract to perform the duties . . . for the sum named. The law does not recognize the principle that a board of

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officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provides, or that such officials can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent." The same principle is recognized and enforced in *Kehn v. State*, 93 N. Y. 291, and *Riley v. Mayor*, 96 N. Y. 331, and the reason for the rule applies in full force here. For reasons satisfactory to the legislature, it saw fit to prescribe the amount of compensation which the printer should receive for the service. Whether it was thought that this compensation would secure better service, or greater faithfulness in the execution of the work, we cannot tell. It is sufficient to say that the law is so enacted, and the courts must conform to it.

It follows from these views that the order of the circuit court must be affirmed, and the cause be remanded for further proceedings according to law.

By the Court.—It is so ordered.

PATRY, Respondent, vs. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

May 24—June 21, 1890.

Railroads: Carriers: Putting off passenger not paying fare: Punitory damages: Reversal of judgment.

1. Plaintiff, having a ticket over another road, got by mistake upon one of the defendant's trains which did not go to her destination. The conductor put her off at a flag station for both roads. The depot at such station was closed at the time, and a dwelling-house near by was also temporarily locked. The plaintiff and her two children were obliged to wait for a train several hours without shelter, and her exposure was followed by a severe illness. The testimony was conflicting as to whether she showed her ticket to the brakeman on

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entering the defendant's train, and also as to whether the conductor demanded payment of fare. *Held:*

(1) If she showed her ticket to the brakeman, the conductor was not justified in putting her off at the flag station unless that was a reasonably safe and convenient point from which she could most expeditiously reach a train on the proper road.

(2) If she did not show her ticket to the brakeman, and if the conductor demanded fare of her which she did not pay, he was justified, under sec. 1818, R. S., in putting her off at the flag station. If that station was not a "usual stopping place" it was at least "near a dwelling-house," and it is immaterial that the occupant of such house was temporarily absent and the house closed while the plaintiff was there.

(3) There being no evidence that the conductor acted in a reckless, wanton, or insulting manner, or that he was influenced by malice or any other improper motive, the plaintiff could not recover punitory damages.

2. An error in authorizing the jury to give punitory damages in a case in which they are not recoverable will work a reversal where it cannot be determined from the verdict whether or not it includes such damages.

APPEAL from the Circuit Court for *Chippewa* County.

This action was commenced in September, 1888, to recover damages for personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the agents and employees of the defendant company operating a train of cars upon its railroad. At the time of the alleged injury (November 14, 1885) the plaintiff resided eight miles from Boyd, a station on the Wisconsin Central Railroad, understood to be about eighteen miles east or northeast of Chippewa Falls. She was then thirty-three years old, was a healthy woman, and had a husband and several children. On the morning of the day last aforesaid, she purchased a ticket on said Central Railroad to Eau Claire and return, and went to Eau Claire on that railroad. She had with her two of her children,— a girl six years old, and another eighteen months old. The Central road going from Boyd to Eau Claire passes through Chippewa Falls and a flag-

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station called Badger Mills, about midway between Eau Claire and Chippewa Falls, and distant some five or six miles from each of those places. The railroad of the defendant company (which for convenience will be called the Omaha road) extends from Eau Claire to Chippewa Falls and beyond. It is understood that the two companies occupy the same depot in common at Eau Claire. At Badger Mills the two roads are within twenty feet of each other, but at Chippewa Falls the two depots were a considerable distance apart at that time. The Omaha road from the latter point diverges from the Central road to the northwest, and does not go to Boyd.

About noon of November 14, 1885, the plaintiff went to the depot at Eau Claire, and upon a train on the Omaha road, going north to Chippewa Falls and beyond. She testified that, as she went upon the train, she showed the conductor thereof her return ticket on the Central road, and he assisted her to go upon the train with her children. Her counsel concedes, however, that this was a brakeman, instead of the conductor. The conductor testified that he did not see the plaintiff until after the train started. The brakeman testified that he saw the plaintiff at the train, and asked her if she was going to Chippewa Falls, and she answered, "Yes;" also, if she had a ticket on the Omaha, to which she answered "Yes;" and that he then assisted her to go upon the train. He further testified that he did not require her to show her ticket (as he should have done) because she was burdened with her children and several bundles, and he thought it would be inconvenient for her to do so.

Soon after the train left Eau Claire, the conductor called upon the plaintiff for her ticket, and she presented to him her return ticket to Boyd on the Central road. He did not retain it. The plaintiff testified that he said nothing to her, or nothing she understood. It appears that the plaint-

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iff is a French woman, and could neither speak nor understand the English language. She further testified that, when the train stopped at Badger Mills, the conductor took her little girl by the hand and led her out of the car. She followed them, and he helped her off the cars with her children and bundles, saying nothing to her, and the train moved on. The conductor testified that when plaintiff presented her ticket he told her he could not honor it, and she would have to pay her fare to Chippewa Falls, and that she said in broken English she had no money; that he told her if she had no money, she had better get off at Badger Mills, and take the Central train there, on account of the location of the depots at Chippewa Falls, because at the latter place she would require money to get to the Central depot. The brakeman testified that, by direction of the conductor, he assisted her to get off the train with her children and packages.

Badger Mills was a flag station for both roads. Up to the preceding February the Central company kept a man there to flag trains on that road when there were passengers for such trains. At that time the flagman died, after which either his widow, or persons who desired to go upon the road, would flag approaching trains. The Central company had a depot there, but it was closed. There was also a dwelling-house near the depot and tracks, which, at the time the plaintiff was left there, was occupied as a residence by the widow of the flagman, but at that particular time she was absent a few hours at the house of her son, half a mile distant, and her house was closed and locked during the time plaintiff was there. The depot was also closed and fastened. The only other building there was an open shed. There were several other dwelling-houses within about half a mile of the depot, but none in sight of it.

The weather seems to have been quite cold and inclement, and the plaintiff and her children were not very warmly

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clad. She tried to get into the depot, and into the dwelling-house, but failed. She went into the shed, but afterwards left it and wandered up and down the track looking for assistance. She wrapped her shawl about her infant to keep her from freezing. She was greatly frightened by her situation, and feared they would all perish. After she had been there about an hour,—perhaps a little less,—a gentleman came along the track to where she was. She could not make him understand her by talking to him, but showed him her return railroad ticket, which explained to him the situation. He humanely remained with her until a train from Eau Claire upon the Central road approached. He flagged and stopped it and put her and her children on board of it. It is a matter of regret that the name of this gentleman is not disclosed, for it would be a pleasure to record it here. When the plaintiff got on the train her infant was chilled almost or quite to the point of insensibility, but the conductor and a lady passenger soon restored it by rubbing its limbs, and it does not appear that any bad results followed. The plaintiff met her husband at Boyd. She was very ill, but was so far restored by stimulants or warm drinks that she was able to ride home in a wagon the same evening. The testimony shows that she was seriously ill after that time for many days, and tends to show that she still suffers from the shock to her nervous system. She was five months advanced in pregnancy at the time, but had no miscarriage, and it does not appear that the child of which she was delivered four months later was injured by her exposure.

The conductor of the Omaha train, who thus left the plaintiff at Badger Mills, testifies that shortly thereafter the company questioned him concerning the affair, and the brakeman testifies that he was asked about it two or three weeks after it occurred, but does not say by whom. This is all the testimony tending to charge the defendant com-

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pany with knowledge, before this action was brought, of the conduct of such conductor and brakeman on the occasion in question, or of what the plaintiff claimed their conduct to have been. The court, among other things, charged the jury as follows: "If you believe from the evidence that the defendant is liable, and that the wrongful act was done in a reckless or wanton manner, or that there were circumstances of aggravation in the conduct of defendant's servants, you will not be limited in assessing damages to the actual or compensatory damages, but may give the plaintiff a further sum as exemplary damages by way of punishment for the wrongful act and as an example to others; and for such damages you may assess such sum as you deem just under the circumstances of the case as shown by the evidence."

Motions for a nonsuit, and that a verdict be directed for the defendant, were respectively denied by the court. The jury found for the plaintiff and assessed her damages at $5,000. A motion by defendant for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

For the appellant there was a brief by *Jas. H. Howe* and *L. J. Rusk*, and oral argument by *Mr. Howe.*

For the respondent there was a brief by *Anderson & Bowe*, and oral argument by *J. B. Anderson.*

Lyon, J. I. The rulings of the circuit court denying the respective motions of the defendant for a nonsuit, that the court direct a verdict for the defendant, and for a new trial, raise the question whether the testimony was sufficient to authorize the court to submit to the jury the question of defendant's liability in the action. The defendant is thus liable if the negligence or wrongful acts of its conductor or brakeman on the train from which plaintiff was put off at Badger Mills was the proximate cause of the injuries of

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which she complains, unless she also was guilty of negligence which contributed directly to such injuries. On the subject of the alleged contributory negligence of the plaintiff, it is sufficient to say that, if the testimony tends to prove any such negligence on her part, the same was not conclusively proved, and hence, if the testimony was sufficient to raise that question, it was properly submitted to the jury. If not sufficient to raise it, the defendant has no reason to complain because the same was so submitted.

Were the injuries complained of directly caused by the negligence or wrongful acts of the conductor or brakeman or both? The learned circuit judge instructed the jury, correctly no doubt, that it was the duty of the plaintiff to ascertain before entering the train that it was the one she desired to take, and if she refused to pay her fare the conductor had a right to put her off the train; also that it was her duty to make herself understood, and the defendant company was not required to provide an interpreter for her. The accuracy of these propositions does not seem to be controverted by counsel for the plaintiff.

The testimony of the plaintiff tended to prove that she exhibited her return ticket on the Central road to the brakeman, and that he put her on the train. If these facts were proved she was lawfully on the train, and it was the manifest duty of the company either to return her, without charge for fare, to the place from whence she started, or to leave her at some other point where she could most speedily, conveniently, and safely reach a train of the Central road which would take her to her destination at Boyd. If she was thus on the defendant's train because of the mistake of the brakeman in respect to her ticket, she was not subject to the provisions of sec. 1818, R. S. That section is as follows: "If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage off the cars, on

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stopping the cars and using no unnecessary force, at any usual stopping place, or near any dwelling-house, as the conductor shall elect." If, therefore, the jury found that she showed the brakeman her ticket when she went upon the train, it was a question of fact for the jury to determine whether, by putting her off the train at Badger Mills, the railway company performed its duties and obligations to her as above stated. If the company failed to do so, the plaintiff is entitled to recover damages for any injury she suffered by reason of such breach of duty.

If, on the other hand, the jury believed that she did not show her ticket to the brakeman, as the latter testifies, then she was subject to the provisions of said sec. 1818; and, if she refused or neglected to pay her fare on demand of the conductor, he had a right to put her off the train at any place answering the requirements of the statute. In that case, however, she was still a passenger upon the train, and entitled to be treated as such in all matters pertaining to her safety.

There is considerable controversy in the arguments of counsel as to whether Badger Mills is such a place as is described in the statute. The same being a place at which trains did not stop unless signaled to do so, it may be doubtful whether it is a "usual stopping place," within the meaning of the statute. But however that may be, the plaintiff was put off the cars near a dwelling-house which was at the time occupied as a residence. This fact fulfills the alternative requirement of the statute, notwithstanding the occupant of such house was temporarily absent therefrom and the house closed during the time the plaintiff was there. Hence we conclude that if the plaintiff did not show her ticket to the brakeman, but went upon the train by reason of her own mistake, and neglected or refused to pay her fare when the conductor demanded it, the latter was justified in putting her off the train at Badger Mills.

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Whether the conductor demanded her fare or not is a disputed question of fact in the case, to be determined by the jury.

The foregoing rules may be thus summarized: If the plaintiff showed the brakeman her ticket, the conductor was not justified in putting her off the train at Badger Mills, unless that was a reasonably safe and convenient point from which she could most expeditiously reach a train on the Central road. It is quite immaterial that the conductor did not know that she had shown her ticket to the brakeman. The company would still be bound by the act of the brakeman, and liable for any injury which might befall the plaintiff by reason of his mistake. If the plaintiff did not exhibit her ticket to the brakeman, and if the conductor demanded fare of her which she did not pay, he was justified in putting her off the train at Badger Mills, and the company is not liable in this action.

There may be passages in the charge of the learned circuit judge to the jury which do not accord with the foregoing rules. If any such occur therein, they can readily be corrected when the cause is again tried. It is clear, however, that there was sufficient testimony to make it the duty of the court to submit to the jury the question of defendant's liability, under proper instructions.

II. The court erred in instructing the jury that in certain contingencies they might award the plaintiff exemplary damages. There is no testimony in the case tending to show that the conductor acted in a reckless, wanton, or insulting manner, or that he was influenced by malice or any other improper motive. On the contrary, it conclusively appears that he acted throughout in a considerate and gentlemanly manner, and in the belief that he was only discharging his imperative duty to his employer. Such being the facts, as a matter of course this is no case for the infliction of punitory damages, and would not be, even were

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the action against the conductor instead of the company. But if the conductor so treated the plaintiff as to be liable to punitory damages, were the action against him, still under the rule which prevails in this state, established in *Craker v. C. & N. W. R. Co.* 36 Wis. 657, *Bass v. C. & N. W. R. Co.* 42 Wis. 654, and other cases, the defendant company is not so liable, for the reason that there is no testimony tending to show any ratification by it of the acts of the conductor. Under the above cases, had the company retained the conductor in its employ after having been fully informed of his conduct as the plaintiff claims and the jury found it to have been, that would have been a ratification of his conduct, which would subject the company to liability for punitory damages. But there is no testimony in the case tending to show the existence of these essential facts.

Counsel for plaintiff argued that the jury would have been justified in assessing the plaintiff's compensatory damages at $5,000, and claims therefrom that the error in authorizing them to give exemplary damages should not work a reversal of the judgment. We do not assent to the proposition that the jury might properly have assessed compensatory damages at $5,000, and did we assent thereto it would not save the judgment. There are no means of ascertaining whether the damages include punitory damages or not, and the fact that it may include them renders the error of the court material and fatal to the judgment.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

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HEDDLES, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 24 — June 21, 1890.

Railroads: Injury to person at street crossing: Evidence: Instructions to jury: Damages: Practice: Remarks of counsel.

1. In an action for injuries to a boy seven years old, which necessitated amputation of both legs, the jury were instructed that in assessing damages they should give adequate compensation for the plaintiff's physical and mental pain and suffering, past and future, occasioned by his injuries; "also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows." *Held*, not error, the words quoted not being intended to specify new elements or grounds for damages, but merely to indicate the causes from which the mental pain and suffering would be likely to arise.
2. The plaintiff having been run over by defendant's engine at a street crossing, an instruction as to the degree of care to be exercised by an engineer on approaching such a crossing, to the effect that the mere fact that a traveler is approaching the track is not sufficient to require the engineer to give an alarm or stop his engine, especially where it is in broad daylight, the engine plainly visible, the engine bell ringing, and the traveler an adult in apparent possession of his senses and looking in the direction of the train; that in such a case the engineer would have the right to assume that the traveler would stop, but that he cannot rest on that assumption so long as to allow his engine to reach a point where it will become impossible for him to control his train or give warning in time to prevent injury to the traveler, supposing the traveler to continue in his course — is *held* sufficiently favorable to the defendant.
3. The engineer having testified that the engine was running only between four and six miles an hour, and that he did not recollect having stated, shortly after the accident, that they were obliged to run faster than six miles an hour to do the work required, evidence that he did so state was admissible for the purpose of discrediting his testimony.
4. Evidence that there was no sign-board at the crossing, warning persons to look out for the cars, was admissible.
5. The whistle on the engine not having been blown, it was not an error prejudicial to the defendant to admit in evidence a city ordi-

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nance prohibiting the blowing of engine whistles within the city limits "except as a necessary signal or to prevent accidents."

6. A witness who was in attendance upon the plaintiff for three or four weeks after he was injured was competent, though not an expert, to state whether he suffered greatly or not.

7. Evidence as to plaintiff's mental condition before and after the injury was admissible.

8. A ruling that a question is admissible is not a ruling as to the admissibility of a part of the answer which is not responsive thereto.

9. A verdict for $30,000 had been set aside. On the second trial counsel for the plaintiff, in an argument to the court in the presence of the jury, referred to the former verdict, claiming that in view of additional facts shown the damages then awarded would not now be excessive. *Held*, that these remarks were not so outside of the case as to justify a reversal of the judgment, especially as the second verdict was for only $18,500.

10. A verdict for $18,500 for injuries to a boy seven years old, necessitating the amputation of both legs and impairing his mental capacities, is *held* not excessive.

APPEAL from the Circuit Court for *Walworth* County.

Action to recover for personal injuries sustained by the plaintiff and alleged to have been caused by the negligence of the defendant's employees. The facts will sufficiently appear from the report of a former appeal in 74 Wis. 239. The facts shown on the second trial were substantially the same as those shown on the first, except so far as indicated in the following opinion. On the second trial the jury assessed the plaintiff's damages at $18,500. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

For the respondent there was a brief by *Fethers, Jeffris & Fifield*, and oral argument by *O. H. Fethers* and *M. G. Jeffris*.

TAYLOR, J. This is an appeal from the judgment on a second trial of this action. On the first trial an appeal was

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taken by the defendant, and the judgment was reversed for reasons stated in the opinion of this court. See case reported in 74 Wis. 239. Upon the former appeal it was held by this court that there was sufficient evidence in the case to support the verdict in favor of the plaintiff, and the judgment was reversed for errors occurring on the trial and because the damages awarded were, as we thought, excessive. On the second trial, there was the same evidence given on the part of the plaintiff as was given on the first trial, and some additional evidence was produced which materially strengthened the case upon the merits in favor of the plaintiff; and the learned counsel for the appellant do not contend on this appeal that there is not sufficient evidence to sustain a verdict for the plaintiff, but they allege that certain rulings of the court on the trial were erroneous, and that such errors were prejudicial to the appellant.

The first error assigned is the instructions of the court to the jury on the question of damages. The instruction objected to reads as follows: "The amount of the damages which you will assess is left to your judgment and discretion, considering the proper elements of damages, which are as follows: Adequate compensation for all of the physical and mental pain and suffering which the plaintiff suffered at the time of the accident, which he has suffered since that time, and which he is reasonably certain to suffer in the future, by reason of his injuries; also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows." The learned counsel for the appellant take exceptions to the use of the words, "for the mortification and anguish of mind which he has suffered, and will suffer in the future, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows."

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It is urged that these words convey to the jury an idea different from that conveyed by the words "mental pain and suffering" which resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to. For authorities sustaining the instructions, see the following cases cited by the counsel for the respondent: *Wilson v. Young*, 31 Wis. 574; *Craker v. C. & N. W. R. Co.* 36 Wis. 657, 677; *Power v. Harlow*, 57 Mich. 107; *The Oriflamme*, 3 Sawy. 397; *Atlanta & R. A. L. R. Co. v. Wood*, 48 Ga. 565; *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill. 19; *Ballou v. Farnum*, 11 Allen, 73; *Western & A. R. R. Co. v. Young*, 81 Ga. 397; *McMahon v. N. C. R. Co.* 39 Md. 438.

The appellant also excepted to the refusal of the court to give the following instruction: "The engineer was not bound to stop his train or resort to unusual precautions the moment he saw the plaintiff, merely because he was approaching the track. It being broad daylight, and his engine plainly visible, and the bell ringing, he had the right to assume in the first instance that the plaintiff would stop in time to escape injury. He had the right to run on until he had evidence that the boy approaching the track was heedless of danger. When he had such notice, he was bound to use all reasonable care and diligence to avoid it." Instead of giving this instruction, the learned judge instructed the jury as follows: "The mere fact that the traveler is approaching the track is not, of itself alone, sufficient

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to require the engineer to give an alarm or stop his engine, especially where it is in broad daylight, the engine plainly visible, the engine bell ringing, the traveler is an adult in apparent possession of his senses and looking in the direction of the train. In such a case, the engineer would have the right to assume that the traveler would stop; but he cannot rest on such an assumption so long as to allow his engine to reach a point where it will become impossible for him to control his train or give warning in time to prevent injury to the traveler, supposing the traveler to continue in his course." We think the instruction as given by the court was sufficiently favorable to the defendant, and that the instruction asked was properly refused because it did not fairly present the case to the jury as it was made by the evidence in the case.

The third exception is taken to the following testimony given by the witness Macloon. Macloon was examined as to a conversation he had with the engineer, Roberts, shortly after the accident, and he testified, under objection, that Roberts in that conversation said: "There is no use talking about six miles an hour. We couldn't do the work if we ran only six miles an hour, and we have to run faster." Roberts had been questioned as to this alleged statement, and he said he had no recollection of making such statement or of having any such conversation. Macloon was called on rebuttal, and asked about such conversation for the purpose of discrediting the evidence of Roberts as to the speed of the train. As this evidence was offered, not as original evidence for the plaintiff as to the speed of the train, but for the purpose of discrediting the evidence of Roberts on that question, we think it was properly admitted. It was substantially so determined on the former hearing in this case. See 74 Wis. 252.

The fourth exception to the evidence offered by the plaintiff, showing that there was no sign-board at the cross-

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ing where the accident happened, was not well taken, as was decided by this court in the case of *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375, 380.

The fifth exception was to the introduction of the city ordinance forbidding the blowing of the engine whistle "within the city limits, except as a necessary signal or to prevent accidents." We think there was no error in admitting this ordinance. It could not prejudice the defendant if the circumstances were such as did not render it necessary to blow the whistle to prevent an accident, and if, under all the circumstances, the jury should be of the opinion that the whistle should have been blown to prevent the accident, the ordinance did not forbid its being blown. As said in the former opinion, "The ordinance clearly contemplated that the whistle might be sounded whenever it should become necessary as a signal or to prevent accidents." We are unable to see how the admitting of this ordinance in evidence could have prejudiced the defendant.

The sixth exception is to a question asked of Elizabeth Spence, a witness for the plaintiff, who had testified that she had been in attendance upon the plaintiff for three or four weeks after he was injured. She said she "was with him the first night after the injury. He suffered very much. He suffered very greatly, and I could see that in his expression how he suffered, and every now and then he would lose his consciousness." Then the witness was asked this question: "To what extent, apparently?" To this question the defendant objected. The court overruled the objection, and the witness answered: "It was very bad. I can't tell, for it was so bad." Certainly, when this answer of the witness is considered in connection with the other evidence in the case as to what the plaintiff suffered from the accident, it is evident that it could not have prejudiced the defendant. We are of the opinion that this witness, from what she saw of the plaintiff and his condition for

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two or three weeks after his injury, was competent to state as a fact whether he suffered greatly or not. It would not require an expert to give an opinion, if the question can be said to call for an opinion instead of a fact which was apparent to her observation.

The seventh error assigned was the overruling of an objection to the following question asked of the father of the plaintiff: "What was the boy's temper before he was injured?" The answer was: "He was of bright and cheerful temper. Now, he is very irritable, and if anything excites him he seems to be uncontrollable." It would seem that the question was a very proper one, as showing that the boy's mental condition was sound before the injury; and we are also of the opinion that the answer as to his mental condition after the injury, although not responsive to the question, was admissible. It would seem that, if an injury caused a permanent mental defect or disease, it would be equally as good ground for the recovery of damages as though a physical defect or disease was the result. But the question did not call for the mental condition of the boy after the injury; and, if the defense objected to the witness stating what such condition was after his injury, he should have moved to strike out that part of the answer stating such condition. It was not called for by the question objected to, and the plaintiff is not responsible except for that part of the witness' answer which is responsive to the question propounded. The ruling of the court that the question was admissible was not a ruling that that part of the answer not responsive to the question was or was not admissible.

After the testimony was closed the counsel for the plaintiff addressed the court as follows: "Upon this trial what was problematical or theoretical is demonstrated; and the proof is here of the failure or decadence or stoppage, whatever view you take of it, of the mental faculties themselves.

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His memory is not so good. He is duller. He cannot learn so well. Now I claim, with that feature added, that the verdict of thirty thousand dollars was not excessive, and that, in giving the instructions to this jury upon a proper amount, that this court should have in mind, when thinking of what the supreme court has said upon the matter, that there is this additional feature in the case." These remarks were objected to by the defendant, and an exception was taken to the remarks of counsel as to what the verdict in the previous trial was. To this exception the court remarked: "You may preserve your exception. I cannot dictate to counsel in advance. Counsel stands here and claims to be making a legal argument, and I cannot say that he is not making a legal argument to the court." We are unable to see any impropriety in the remarks of counsel as above quoted. Counsel had the right to claim, if the testimony in the case made a stronger case for damages than on the first trial, that the fact that this court had declared that in their opinion the former verdict was too large should not govern the court in instructing the jury upon that point in the present trial. These remarks were not so outside of the case as to justify a reversal of the judgment, especially as the verdict shows that they could not have prejudiced the defendant on the question of damages; the jury in this case fixing the damages at $18,500,—$11,500 less than the verdict on the first trial.

The ninth error assigned is that the damages assessed are excessive. The counsel for the appellant has not urged this point upon the court in his oral argument. To the ordinary young man, $18,500 is a large sum of money; but we cannot say that it is too large a sum to make him compensation for an injury which has to a great extent destroyed his capacity to contend successfully with his fellows for those things which make life enjoyable and happy, and which has

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left him in such a state, both physically and mentally, as must render his life a burden hard to bear.

The case seems to have been fairly tried upon the merits, and none of the exceptions taken seem to us of sufficient importance to justify a reversal of the judgment.

By the Court.— The judgment of the circuit court is affirmed.

MUETZE, Respondent, vs. TUTEUR and another, Appellants.

May 24 — June 21, 1890.

LIBEL: APPEAL. *(1) Envelopes of association for collecting bad debts. (2) List of delinquent debtors. (3) Liability of member causing publication. (4-7) Evidence: Publication: Special damage: Reputation. (8) Instructions to jury: Immaterial error: Waiver. (9) Certificate to bill of exceptions.*

1. Envelopes addressed to a debtor and having printed thereon, in a manner calculated to attract special attention, the name of an association and the statement that it is *for collecting bad debts*, are libelous, and the sending of such envelopes through the mails is a sufficient publication.
2. A list of delinquent debtors, published by an association for collecting bad debts and sent to all its members throughout the United States and Canada, is not a privileged communication. The printing of a person's name in such list is libelous, and the distribution of a book containing the list among the members of the association is a sufficient publication.
3. A member of the association who caused the sending of such envelopes and the printing of the name in such list, is responsible for the libel.
4. It being stated in the book containing such list that it is placed in the hands of all members of the association, and such book being in the hands of one member, who refused to give credit to a person whose name was in the list, the presumption is that the book was distributed as stated.
5. In an action for the libel by the person to whom credit was refused, the plaintiff was properly allowed to testify that the person refusing him credit exhibited such book to him.

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6. In such action it was sufficient to show that the plaintiff was refused credit on account of the book, without showing that the person refusing the credit had ever trusted him or would have trusted him but for the book.
7. In such action the plaintiff could not properly be asked how many persons he owed besides the defendant. His general character or reputation only could be shown.
8. A statement in the charge to the jury that "the evidence shows *three* letters, I think, were mailed," etc., when there were in fact but *two*, is *held* not a material error. In such a case counsel should suggest the correction of the error at the time; otherwise it will be deemed to have been waived.
9. A certificate to a bill of exceptions regularly signed by the judge, that "the above and foregoing was and is all the testimony given on the trial of the above-entitled action," is sufficient.

APPEAL from the Circuit Court for *La Crosse* County.

Action for a libel. The facts are stated in the opinion. The defendants appeal from a judgment in favor of the plaintiff.

For the appellants there was a brief by *Losey & Woodward*, and oral argument by *G. M. Woodward*. To the point that the publication in the book was privileged, they cited *King v. Patterson*, 49 N. J. Law, 417, dissenting opinion; *State ex rel. Lanning v. Lonsdale*, 48 Wis. 369; *Locke v. Bradstreet Co.* 22 Fed. Rep. 773; *Missouri Pac. R. Co. v. Richmond*, 73 Tex. 568.

E. C. Higbee, for the respondent, argued, among other things, that the communications were libelous *per se*. *Woodling v. Knickerbocker*, 31 Minn. 268; *Bradley v. Cramer*, 59 Wis. 309; *Dennis v. Johnson*, 42 Minn. 301; Townsh. Sland. & Lib. (4th ed.), secs. 191, 192; *Brown v. Smith*, 13 C. B. 596; *Williams v. Davenport*, 42 Minn. 393; *Johnson v. Comm.* 14 Atl. Rep. (Pa.), 425; *Beals v. Thompson*, 149 Mass. 405. They were not privileged. *Cochran v. Melendy*, 59 Wis. 207; *King v. Patterson*, 49 N. J. Law, 417; *Montgomery v. Knox*, 23 Fla. 595; *Lynch v. Febiger*, 39 La. Ann. 336; *Byam v. Collins*, 111 N. Y. 143.

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ORTON, J. This action is for libel, and the plaintiff recovered $571. The facts are substantially as follows:

The plaintiff is a jeweler by trade, but at one time kept a saloon, and traded with the defendants, who were merchants in goods suitable to the saloon business; and finally, up to July, 1883, there was a balance of account against the plaintiff, which the defendants claimed amounted to the sum of $23.13, but the plaintiff claimed it to be much less than that amount. There was an association, with its central office at Chicago, called "The United States and Canada Dealers' Protective and Detective Association," claimed to have been incorporated under the laws of Illinois (but which had not been), the object of which is stated on an envelope used by it to inclose correspondence by mail to be "an organization of business and professional men *for collecting bad debts.*" The answer in respect to the association is as follows: "These defendants admit that they were members of an association known [as above described], and allege that the same is organized for the purpose of protecting dealers giving credit against worthless debtors, and against those who contract debts and do not pay; and for the further purpose of communicating to the members of such association, for their mutual protection and safety, the names of all persons against whom unsettled claims remain outstanding and unpaid in favor of members of said association, and which names have been reported by members to the central office, after having taken the necessary steps required by the rules of said association to be taken by the members thereof before reporting such names in order to give the debtor ample and full notice thereof and ample opportunity to settle all claims and avoid such report; that the said association publishes a book at regular intervals giving the names of all persons so reported by members, and against whom there are unsettled claims in favor of members; . . . that said book is distributed

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only to members of the association, and to no one else whatsoever, and all communications made by any member to said association, or by said association to any of its members, are strictly confidential and secret, for the purpose of their mutual protection and security."

On February 9, 1888, the defendant sent to the plaintiff, at La Crosse, one of the letters of said association, headed by its regular designation, signed by the firm of *Isaac Tuteur & Son*, in which they say that they have become members of such association, and then state its general purposes, and ask the plaintiff to call and settle, or they shall be obliged to report his name to the association before February 18th, "after which date *their matter goes to press.*" On said 18th day of February the plaintiff received another letter through the mail, with a similar heading, and signed "Agent," in which it is said: "*I. Tuteur & Son*, one of the members of our association, informs me that you have received our association letter in regard to your indebtedness, and that you have failed to respond. Now, before reporting your name to the main office for publication, allow me to inform you as to some of the consequences of being published in this manner as a delinquent." The letter then states the consequences as above stated, and that if the plaintiff did not wish his name so published he must by all means call on the defendants and make some satisfactory arrangement in regard to the claim on or before the 29th day of February, or his name would go forward to the main office.

On March 1st another letter was written to the plaintiff, dated at Chicago, stating that the defendants, a member of the association, informed them about the claim, and that reasonable time had been given him to pay it, and notifying him that if he did not pay by March 15th the consequences would be as previously threatened. This letter, with a similar heading, was signed by C. R. Collin as sec-

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retary. Another letter was written from Chicago, dated March 10th, notifying plaintiff to make immediate payment of the claim within twenty days, and another one dated Chicago, June 10, 1888, with a similar notice to pay within ten days. These two last letters were inclosed in an envelope, respectively, and passed through the mail to plaintiff in La Crosse, and the envelope was indorsed as follows: "Return in twenty days to the United States and Canada Protective and Detective Association, an organization of business and professional men *for collecting bad debts.* Central office, 139 Madison Street, Chicago. For *Paul Muetze*, La Crosse, Wis." Each of these letters or notices was also headed, "Main Office Notice." There were two other letters received by plaintiff from the main office at Chicago,—the first dated August 10th, and the other September 12th; the first notifying plaintiff to pay within twenty days, and the other within eighteen days, inclosed in similar envelopes, excepting the clause, "for collecting bad debts," which is omitted. The envelope containing this clause, "collecting bad debts," is of red paper, and these words are in very large type, so as to attract special attention.

After these communications, the plaintiff applied to a Mr. Borreson, a jeweler of La Crosse, for whom he had at one time worked, for credit, or to be trusted for a small amount, and he refused on account of his having received a book of said association containing the name of the plaintiff as a person unworthy of credit. The book was issued July 1, 1888, and contains the plaintiff's name among many others in various parts of the United States. In a preface to the book, addressed to members, it is stated that the association "is not a collection agency . . . *but uses its influence to make your debtor pay you.*" When the debtor paid the claim, his name was taken out of the book. As stated in the answer, the debtor is given an opportunity to pay, if he

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will, before his name is inserted in the book. The several letters are so many threats that the plaintiff's name will be so published if he fails to pay. The defendants had demanded $23.13, and the letters make the same demand; but the defendant admitted, as a witness, that he had made a mistake of $3.05 in the account, and that the claim was only $20.07.

I have stated the facts more fully and explicitly in order to show what are the objects of the association. It is claimed by the learned counsel of the appellants that its purposes were right and honorable, like a railroad company that issued a pamphlet containing the names of its discharged employees, to be circulated among other companies, or commercial agencies and the like, for mutual protection against unworthy persons. The envelope of two letters from Chicago contains a distinct libel in itself, which could have been read, and probably was read, by many persons not members of the association. They are made to attract special attention, and publish the fact that the association was in correspondence with the plaintiff for the purpose of collecting *a bad debt* of him, and implies that he is a bad debtor who fails or refuses to pay his honest debts, and that he is unworthy of credit. But this is not all. It is also a public statement that the object and purpose of the association are for "collecting bad debts." The several letters were written and sent to the plaintiff, and such letters are no doubt sent to others to collect bad debts; and, if they fail to pay, their names are published in the book also for the purpose of collecting bad debts, for, as soon as payment is made, the publication of their names is discontinued. They are then published in a list of those who have settled up. In the book in evidence there is such a list of those whose credit is restored by their having paid up their bad debts. The object is not to protect the members from trusting this class of debtors, but to aid them in coercing

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payment. This book of the association, with its list of delinquent debtors, is the pillory or punishment threatened and to be endured if they do not pay and until they pay their debts, and then they are discharged. This object is too apparent to be disguised. Why write so many letters, or why write at all, to the debtors, if the object be to publish to the members a list of delinquent debtors, or of persons unworthy of credit, to protect them against trusting them? After a debtor has been thus coerced into reluctant payment, he is no more worthy of credit than he was before. Why discontinue his name among the bad debtors, and place it among those who pay their debts? They say, in their address to the members, "it is to make your debtor *pay up*." It follows that the members, to whom this publication is sent in book form, are not interested in it in any other way than to make their own debtors pay up.

The communications of this association are not only libelous and not privileged, but they would seem to constitute the offense of "threatening communications," as defined in sec. 4380, R. S. The complications of this peculiar association, to bring it within the protection of the law, make it difficult to treat less briefly. As we now understand the real character of this association and of its publications, we may apply the law involved in the various exceptions.

1. Was it error to allow the plaintiff to testify that Borreson exhibited the book to him? The learned counsel of the appellant contends that such act could not constitute a libel or publication of a libel, and that the defendants cannot be charged with the responsibility for Borreson's violation of his obligation to keep the names in the book confidential. Probably not, and yet the plaintiff had the right to find out, if he could, why Borreson would not trust him; and it was certainly proper for him to prove, if he could, that it was on account of this publication.

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2. Was it error to sustain the plaintiff's objection to the question put to him on cross-examination: "How many men in this city did you owe besides *Tuteur?*" The object of this question must have been to justify or mitigate the libel by showing that the plaintiff had no credit or character for trustworthiness that could suffer by it. There is no principle better settled than that in such cases specific acts cannot be shown, and that it is a question of general character or reputation alone. *Wilson v. Noonan*, 27 Wis. 598; *Campbell v. Campbell*, 54 Wis. 90.

3. Was it error to overrule the motion for a nonsuit? It is contended that the letters of the defendant to the plaintiff were not in themselves libelous, and that the other letters sent to him from Chicago were not, and that the defendants were not shown to be responsible for them, and that there was nothing in the book that imputed any bad character to the plaintiff as being unworthy of credit, and that there was no evidence that any other copy of the book, except the one received by Borreson, had been sent to any one, and, finally, that the envelopes inclosing two of the letters, containing the words, "for collecting bad debts," were not libelous.

The letters were not libelous in themselves, but the defendants' letters were proper to show their connection with the association as one of its members, and with its proceedings against the plaintiff. The defendants set in operation the whole scheme, and caused the other letters to be written and sent to the plaintiff, and they were sent for them and in their behalf. It was through the agency of the association and its officers that all the communications were made to the plaintiff, and finally his name placed in the bad debtor list in the book of the association, and the defendants were directly responsible for all that was done.

The learned counsel contends that the two envelopes containing the words, "for collecting bad debts," were not

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only not libelous, but a mere violation of the laws of the post office department, and which were changed as soon as it was decided about that time that it was an offense against the postal laws of the United States. Was it not decided that it was an offense because the words were abusive and libelous? There certainly could not have been any other reason. But I have already shown that the words imputed to the plaintiff a bad character and a want of credit, which implied that he was a cheat and a swindler and that the correspondence inclosed was for the purpose of collecting from him a bad debt.

The book itself claims that they have members all over the country, in whose hands the book is placed; and if Borreson had one it was strong evidence that all the members were supplied with it. At least, such would be the presumption of fact from the declared intention of the association. The plaintiff was notified and threatened in the letter signed by Collin, the secretary, that if he did not pay up by the 15th day of March, 1888, he would be published in their "list of delinquent debtors, *which will be delivered to all members of the association in the United States and Canada.*" The sending through the mail of those envelopes with such an imputation of dishonesty, and the distribution of the book among the members with the plaintiff's name in the black-list of bad debtors, constituted sufficient publication of the libel. The effect as well as the intention of these libels was to discredit and disgrace the plaintiff among business men; and this was the punishment threatened if he did not pay as ordered. If it would work no injury to the delinquent, it would not operate as an inducement for him to pay up.

It is claimed that no special damage to the plaintiff was proved by Borreson refusing to trust him for a small bill of jewelry, because it was not shown that Borreson had ever trusted him, or would have trusted him but for the book.

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It is sufficient if Borreson refused him credit on account of the book, and the question of special damages was for the jury. This disposes of the reasons urged in support of the defendants' motion for a nonsuit, and also in support of the motion that the court direct the jury to find for the defendants.

4. Errors are assigned on certain instructions to the jury. The learned circuit judge said to the jury: "The evidence shows that *three* letters, I think, were mailed from La Crosse by the defendants, of this character." The learned counsel claims that this error of fact was very injurious to the defendants, because it would imply that all three of such letters were inclosed in that offensive envelope, when in fact there were only two of such letters. The jury would probably recollect that there were only two of such envelopes, whether they should be misinformed as to the number of letters or not. The statement was not positive, but made rather inquiringly by the qualification, "I think." In such a case, where the court mistakes the evidence in this way from the want of a distinct recollection of it, it is the duty of the counsel to suggest its correction at once, and not silently reserve it for a future exception. He owes this duty to the court. It is not an error of law. We may presume that the jury remembered the evidence for itself, and we cannot presume that they were at all affected by this mistake. The counsel, in such a case, should be held to have waived the error by his silence when he ought to have spoken. It is not very material any way, and should be disregarded.

The learned judge instructed the jury, in substance, that the communication would not be privileged if made to persons not interested in knowing the standing of the plaintiff; for instance the members in Canada. This instruction presupposes that the communication was privileged so far as the members were concerned who had an interest in know-

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ing the standing of the plaintiff. This did the defendants no harm, for most clearly the jury correctly found that it was not privileged, and this question was submitted to them by the court. We have seen that there was no object or purpose of the association to protect or serve any one except the creditor interested in collecting the debt. The authorities cited by the learned counsel have no application to such a case. There can be no question but that the communications were grossly libelous. On this general question, see the authorities cited in the brief of the learned counsel of the respondent. In speaking further on the question whether the matter was privileged, the learned judge said to the jury: "Whether it was a communication that was desired, well, there is no evidence that it was desired by anybody." This is a little obscure, but its meaning was, probably, that no one was interested in the matter except the defendants, and that no one else had any reason to desire it. The jury could not have been materially misled by it, whatever it might mean.

The verdict is not excessive.

The respondent's counsel omitted to argue these various exceptions, because he insisted that the certificate to the bill of exceptions is insufficient to make them a part of the record. The certificate is that "the above and foregoing was and is all the testimony given on the trial of the above-entitled action." But the bill of exceptions is regularly signed by the judge, as the law requires, and thereby became a part of the record (sec. 2873, R. S.), and it contains all the exceptions and the matters to which they relate. That is sufficient. What it contains need not be stated in the certificate, except whether it contains all the evidence. The objection is too technical.

We can find no error in the record.

By the Court.— The judgment of the circuit court is affirmed.

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PIPER, Respondent, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

May 26 — June 21, 1890.

Railroads: Injury to person at street crossing: Unlawful rate of speed: Contributory negligence: Court and jury.

1. To run a train at an unlawful rate of speed within the limits of a city is negligence.
2. When a traveler on a public street in a city approaches a railway crossing he may properly assume, if nothing appears to the contrary, that a train is moving at a lawful rate of speed; and if it was moving at an unlawful rate, that fact may be considered in determining the question of contributory negligence.
3. In an action for injuries sustained at a railway crossing in a city, the testimony tended to show, among other things, that when between fifty and sixty feet from the crossing the plaintiff looked in the direction from which the defendant's train was coming, and did not see it, though he could have seen it had it then been within 900 feet of the crossing; that his attention was diverted by the conduct of his horses, so that he did not look again in that direction until he reached the track, when the train was so near that a collision could not be avoided; that the train was running thirty-six miles or more an hour, and that no warning was given as it approached the crossing; and that if the train had been 900 feet away when the plaintiff first looked, and had been running at the lawful rate of six miles an hour, he would have passed far beyond the crossing before the train reached it. *Held*, that it could not be said, as a matter of law, that the plaintiff was guilty of contributory negligence.
4. Although the statute did not require the whistle to be blown at that place, if those in charge of the train saw the plaintiff approaching the crossing and believed that he was unaware of the train's approach, it was their duty to sound the whistle as well as to take every other reasonable precaution to prevent the collision.
5. It was not error to charge that it was the peculiar province of the jury to decide whether the whistle was blown at the whistling post, or the engine bell rung before and while passing over the crossing, as well as the rate of speed at which the train approached the same.

APPEAL from the Circuit Court for *Jefferson* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an action for damages sustained October 13, 1888,

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at a street crossing of the defendant's railway track one mile east of its Watertown depot, and within the city limits but outside of the platted portion thereof. It appears from the undisputed evidence that the railway at that point runs a very little north of west and south of east, and is straight for two miles east of the crossing, and for more than 1,100 feet west of the crossing; that the street mentioned is what is known as the "Old Milwaukee Road," and crosses the railway at that point in a northwesterly and southeasterly direction, forming an acute angle of twenty-seven and one half degrees; that such highway had existed for about forty years, and is the main traveled thoroughfare from Pipersville to Watertown; that the railroad track for 275 feet east of the crossing is above the ground on the southerly side about four and one half feet; that at the end of that distance commences a cut which extends easterly for about 275 feet further, the deepest part of which is 400 feet from the crossing at the south right-of-way fence, where the top of the bank is six and three fourths feet above the level of the crossing; that from that point, which is about 600 feet east of the crossing, there commences a second cut, known as the "deep cut," which continues easterly beyond the whistling post, which is a quarter of a mile from the crossing; that the highest part of the embankment on the southerly side of that deep cut is about twenty-two feet above the track at a point about 1,100 feet east from the crossing; that the space between said right of way and the highway near and east of the crossing contained many trees, a house, barn, sheds, wood-pile, corn-crib, stacks, etc.; that the right of way at the crossing is about eighty feet wide, with a wire fence on both sides; that the highway is about fifty feet wide, with a board fence on the northeasterly side, with cattle-guards on each side of the crossing, and a plank crossing twenty-eight feet wide about midway between the two cattle-guards; that the regular leaving times for the passenger train in question were: From Milwaukee, 11:15

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A. M.; from Ixonia (six miles east of this crossing), 12:46 P. M.; and from Watertown, 1:02 P. M.,—and that the plaintiff was at the time well acquainted with the time when the train usually passed.

There is testimony on the part of the plaintiff to the effect that on the day in question the plaintiff started from his home on said highway, four and one half miles east of this crossing, about 12:30 P. M.; that upon reaching the top of Koch's hill, so called, about one hundred rods east of the crossing, the railway track to the east could be seen for more than a mile; that he there looked carefully for approaching trains, but observed none; that, from that point up to the defendant's right of way, no view whatever of the track could be seen; that he drove slowly down the hill; that upon reaching the foot, and perhaps twenty or thirty rods distant from the crossing, his horses struck into a moderate trot, and continued in that way until well upon the defendant's right of way; that while coming down the hill, and from about the middle thereof until so reaching the right of way, he listened carefully but neither heard nor saw anything to indicate an approaching train; that after he left the stony portion of the hill the road was very dusty, and the wagon made but little noise; that immediately upon going onto the right of way, and somewhere between fifty and sixty feet from the crossing, he turned partially in his seat and looked east and listened for approaching trains, and continued to do so until his horses slowed down to a walk, but saw no train, nor sign of any train, approaching; that from that point the plaintiff could have seen the train, had it then been anywhere within at least 900 feet east of the crossing; that thereupon his horses took perhaps a few steps forward, but he could not say how many, when suddenly the near horse began dancing and jumping forward, and the off horse struck into a trot; that thereupon he drew up the reins, and took them well in

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hand,— drew them up firmly, but did not try to stop the horses; that when his horses began to dance, jump, and trot as stated, he turned from looking up the track to see what had started them; that he first looked over his horses, to see if anything was the matter with the harness, but saw nothing; that he then looked in the direction of the city to the left,— to the west,— to see if any train was approaching from that direction, but saw nothing; that he then turned to look to the right-hand side, to see if anything or anybody had made any motion to start his horses up, but saw nothing; that then, fearing that perhaps some one had driven up behind him, and was attempting to drive past him on the right-hand side, he turned, and, as he brought his eyes back to the crossing he noticed that the forward feet of both his horses were very nearly in the center of the track; that he then looked eastward to see who had driven up to pass by him, and saw the engine coming down behind him, and, as he judged, 150 to 175 or 200 feet distant; that upon seeing the engine he pulled with all his strength upon the left rein to bring the horses off the track, knowing, if they made any progress forward, it was certain death to himself; that his eyes lingered just an instant on the engine; that he was horror-stricken to see it coming upon him; that he then turned to see if there was any possibility of saving himself; that he saw the near horse was entirely off the track, and the off horse had his forward feet only inside the rail about twelve to sixteen inches; that, while the off horse was in the act of turning away to avoid the engine, he saw the cow-catcher plow under his feet, and the forward part of the engine strike him; that he was himself then so near that, if he had had his right arm extended, he might have touched the driving wheel as it shot by him; that he shut his eyes, thinking he should be crushed under the wheels of the cars, and that that was the last he knew for hours afterwards; that from the time he got there, upon the

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right of way, and until he looked around and saw the cars as stated, he heard no ringing nor whistling on the part of the train, and is positive that no signal was given, and that he heard no sound of any train; that the day was very quiet and warm; that a gentle breeze was blowing from the northwest; that he listened all the time — at least after he got within forty rods of the crossing, but heard nothing; that it was about 1:20 P. M. when the accident occurred; that the train got to Watertown depot at about 1:25 P. M.; that the train at the time was running very fast,— fifty or sixty miles an hour.

For the injury sustained by the plaintiff in his person, and to the horses, harness, and wagon, he brings this action. At the close of the trial the jury returned a verdict in favor of the plaintiff of $7,500, and from the judgment entered thereon the defendant appeals.

John T. Fish, attorney, and *H. H. Field*, of counsel, for the appellant, contended, *inter alia*, that under the testimony as to the speed of the team and of the train, and as to the view of the track, the train must have been in plain sight when the plaintiff was sixty feet from the crossing, and if he looked at that point he must either have seen it or looked so negligently and carelessly as not to see it. The testimony of the plaintiff that he looked and saw no train does not make a conflict of testimony sufficient to go to the jury. *Artz v. C., R. I. & P. R. Co.* 34 Iowa, 153, 159; *Bloomfield v. B. & W. R. Co.* 74 id. 607; *Carroll v. P. R. Co.* 12 Weekly Notes (Pa.), 348; *Pence v. C., R. I. & P. R. Co.* 63 Iowa, 746, 752–3; *Penn. R. Co. v. Bell*, 122 Pa. St. 58; *Marland v. P. & L. E. R. Co.* 123 id. 487; *Penn. R. Co. v. Mooney*, 126 id. 244; *Cleveland, C., C. & I. R. Co. v. Elliott*, 28 Ohio St. 340. Where the evidence shows that a view of the track can be had at any particular distance from the crossing, the presumption of law is either that the traveler looked and saw the train or that he did

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not look; and in either case he is negligent. Shearm. & Redf. Neg. (4th ed.), sec. 476; *Cones v. C., I., St. L. & C. R. Co.* 114 Ind. 328; *Chicago & E. I. R. Co. v. Hedges*, 118 id. 5; *Wilcox v. R., W. & O. R. Co.* 39 N. Y. 358, 361; *Tolman v. S., B. & N. Y. R. Co.* 98 id. 198, 204; *Brown v. M. & St. P. R. Co.* 22 Minn. 165, 167; *Lesan v. M. C. R. Co.* 77 Me. 85. If the plaintiff looked at a place where, by reason of obstructions, an extended view of the track could not be had, and failed to look after coming to a place where the view was clear, such conduct is negligence which defeats a recovery. *Weyl v. C., M. & St. P. R. Co.* 40 Minn. 350; *Atchison, T. & S. F. R. Co. v. Townsend*, 39 Kan. 115; *Haines v. I. C. R. Co.* 41 Iowa, 227; *Salter v. U. & B. R. R. Co.* 75 N. Y. 273, 278–9; *Fletcher v. Fitchburg R. Co.* 149 Mass. 127; *Marty v. C., St. P., M. & O. R. Co.* 38 Minn. 108; *Freeman v. D., S. S. & A. R. Co.* 74 Mich. 86; *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375, 383; *Cullen v. D. & H. C. Co.* 113 N. Y. 667. The plaintiff was negligent in driving rapidly upon the track without pausing or slackening his pace to look and listen for approaching trains. *Seefeld v. C., M. & St. P. R. Co.* 70 Wis. 216; *Salter v. U. & B. R. R. Co.* 75 N. Y. 273; *Weyl v. C., M. & St. P. R. Co.* 40 Minn. 350, 353; *Cones v. C., I., St. L. & C. R. Co.* 114 Ind. 328; *Connelly v. N. Y. C. & H. R. R. Co.* 88 N. Y. 346; *Schaefert v. C., M. & St. P. R. Co.* 62 Iowa, 624; *Haas v. G. R. & I. R. Co.* 47 Mich. 401; *Griffin v. C., R. I. & P. R. Co.* 68 Iowa, 638; *Mantel v. C., M. & St. P. R. Co.* 33 Minn. 62; *Powell v. N. Y. C. & H. R. R. Co.* 109 N. Y. 613. Those in charge of the train, after discovering the plaintiff on the highway, had the right to assume that he would not attempt to cross without looking or listening for trains, and that he would stop before crossing the track if a train was approaching. *Yancey v. W., St. L. & P. R. Co.* 93 Mo. 433; *Moody v. P. R. Co.* 68 Mo. 470, 473–4; *Dyson v.*

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N. Y. & N. E. R. Co. 57 Conn. 9; *Warner v. N. Y. C. R. Co.* 44 N. Y. 465, 469; *Wabash, St. L. & P. R. Co. v. Krough*, 13 Bradw. (Ill.), 431; *Chicago, B. & Q. R. Co. v. Damerell*, 81 Ill. 450, 453. Negligence on the part of a railroad company in failing to give signals, or in running at a prohibited rate of speed, will not excuse a traveler from looking and listening, and he is not entitled to assume that the persons in charge of the train will observe all proper precautions on their part. *Abbot v. Dwinnell*, 74 Wis. 525, 526; *Kelley v. H. & St. J. R. Co.* 75 Mo. 138; *Railroad Co. v. Houston*, 95 U. S. 697; 1 Thomp. Neg. 426; *Calligan v. N. Y. C. & H. R. R. Co.* 59 N. Y. 651; *Schofield v. C., M. & St. P. R. Co.* 114 U. S. 615; *Gorton v. E. R. Co.* 45 N. Y. 660, 664; *Havens v. E. R. Co.* 41 id. 296, 299; *Ormsbee v. B. & P. R. Corp.* 14 R. I. 102; *Wabash, St. L. & P. R. Co. v. Wallace*, 110 Ill. 114; *Ernst v. H. R. R. Co.* 39 N. Y. 61, 68; *Harlan v. St. L., K. C. & N. R. Co.* 64 Mo. 480; *Union Pacific R. Co. v. Adams*, 33 Kan. 427; *State v. M. C. R. Co.* 76 Me. 357; *Kearney v. C., M. & St. P. R. Co.* 47 Wis. 144; *Schilling v. C., M. & St. P. R. Co.* 71 id. 255; *Williams v. C., M. & St. P. R. Co.* 64 id. 1.

For the respondent there were briefs by *E. P. Smith* and *F. B. Tuttle*, and oral argument by *Mr. Smith.*

Cassoday, J. As indicated in the foregoing statement, there is evidence tending to prove that at the time of the accident the train was from fifteen to twenty minutes behind its regular time. One of the plaintiff's witnesses testified, in effect, that on the day of the accident he started from King's steam-mill, on First street, in Watertown, with a load of feed, for his home, *while the 1 o'clock whistles were blowing;* that he went on the street in question; that he passed the crossing, and met and passed the plaintiff at the foot of Koch's hill; that he got up over the hill, and neither

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heard nor saw anything of the train. Assuming the credibility of the witness, and the circumstances stated tend strongly to prove that the train was considerably behind the regular time. The evidence on the part of the defendant strongly tends to prove that the train left Ixonia at 12:50 P. M., and reached the place of the accident about 1 o'clock; but, of course, the jury had the right to believe the witnesses on the part of the plaintiff instead of those on the part of the defendant. There is also a considerable conflict in the evidence as to the speed of the train. The conductor testified that he ran from Ixonia to the crossing, a distance of six miles, in ten minutes,— that is to say, at the rate of thirty-six miles per hour,— which would be 900 feet in seventeen seconds. Such a rate of speed within the limits of the city was unlawful, and hence negligent. Sec. 1809, R. S.; *Horn v. C. & N. W. R. Co.* 38 Wis. 463; *Ewen v. C. & N. W. R. Co.* 38 Wis. 613; *Haas v. C. & N. W. R. Co.* 41 Wis. 44; *Heddles v. C. & N. W. R. Co.* 74 Wis. 239; *Hooker v. C., M. & St. P. R. Co.* 76 Wis. 542. Since such negligence contributed directly to the injury, it must be regarded as having established the defendant's negligence.

But the principal controversy is whether the plaintiff was guilty of contributory negligence in driving upon the crossing as mentioned in the foregoing statement. The particular conduct of the plaintiff complained of is his failure to look in the direction of the coming train after reaching a point within fifty feet of the crossing. He testified that he did look in that direction when between fifty and sixty feet from the crossing; and other testimony tends to prove that, from the point where he so looked, he could have seen the train had it then been anywhere within at least 900 feet east of the crossing. The jury had the right to believe that testimony, and evidently did. Assuming that testimony to be true, as we must on this appeal, and

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it follows conclusively that while the plaintiff was passing over the fifty or sixty feet the train passed over at least 900 feet; that is to say, the train was moving fifteen or eighteen times faster than the plaintiff. This being so, it follows that if the plaintiff was moving at the rate of three or four miles per hour then the train must have been moving at the rate of from forty-five to sixty miles per hour. The conductor testifies that applying the air-brakes when a train is running at the rate of thirty-five miles an hour will stop the train in a distance of about 600 feet; that this train ran about 620 feet after the air-brakes were applied. Had the train been running upon the statutory time of six miles an hour while passing over the 900 feet, and the other conditions had remained as assumed, it is very evident that the plaintiff would not only have safely crossed the track before the train reached it, but would have reached a point some two or three hundred feet beyond. This court has held, in effect, that, where a traveler on a public street in a city approaches a railway crossing, and nothing appears to the contrary, he may properly assume that a train is moving at a lawful rate of speed, and if it transpires that such speed was unlawful that fact may be taken into consideration in considering the question of contributory negligence. *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489. The same rule has been sanctioned by other courts. *Loucks v. C., M. & St. P. R. Co.* 31 Minn. 526; *Thomas v. D., L. & W. R. Co.* 8 Fed. Rep. 732; *Newson v. N. Y. C. R. Co.* 29 N. Y. 383; *Penn. R. Co. v. Ogier*, 35 Pa. St. 72. This rule is really sanctioned by *Allen v. M. C. R. Co.* 19 Atl. Rep. (Me.), 105, cited by counsel for the defendant.

It is claimed as a matter of law that the plaintiff was not excusable, upon any theory, from omitting to look eastward along the track after getting within fifty feet of it, since every step of the team forward enabled him to see for a greater distance in the direction of the approaching

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train, and since his horses were perfectly gentle and might have been stopped at any instant. But it is to be remembered that the plaintiff may have been lulled into a sense of security by thus failing to see the train when he did look, so that under all the circumstances stated we are unable to say, as a matter of law, that the momentary diversion of the plaintiff from looking in the direction of the coming train by reason of the conduct of his horses was not excusable. *Butler v. M. & St. P. R. Co.* 28 Wis. 487; *Bower v. C., M. & St. P. R. Co.* 61 Wis. 457; *Ferguson v. W. C. R. Co.* 63 Wis. 152; *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375; *Duame v. C. & N. W. R. Co.* 72 Wis. 523; *Kellogg v. N. Y. C. & H. R. R. Co.* 79 N. Y. 72. In *Penn. R. Co. v. Ogier*, 35 Pa. St. 72, the evidence in support of the verdict against the claim of contributory negligence was weaker than in the case at bar, but the court said: "The theory that the deceased might have seen 623 feet along the railroad in the direction in which the train was approaching, from a point at which he might have stopped the progress of his horse and escaped danger, but did not see it until within 174 feet of him, if considered abstractly, and entirely unshaken by any or every other consideration, would have presented a strong case of negligence; but even then it would scarcely have justified a court in saying there was negligence, as a matter of law, when but seventeen seconds were allowed for action to the party in danger." The facts in the case at bar differ materially from those present in *Allen v. M. C. R. Co.* 19 Atl. Rep. (Me.), 105.

The contention of the able counsel for the defendant to the effect that the plaintiff was guilty of contributory negligence for not looking eastward when forty-eight feet or less from the track, and from a point where he might have seen the train approaching anywhere within 1,235 feet of the crossing, is peculiarly applicable to the engineer and

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fireman operating the train, and of course, in law, equally to the defendant. It was a part of their duty to keep a lookout in the direction they were going, especially while passing over streets in a city at such a rate of speed. *Heddles v. C. & N. W. R. Co.* 74 Wis. 247. They could have stopped the train at any time, by applying the air-brakes, in a distance of 600 feet, even when running at the rate of thirty-six miles an hour. There is no evidence that their attention was diverted by anything. Had they looked, they certainly could have seen the plaintiff and his team approaching the track for the distance named; and yet, according to the testimony of the plaintiff, they neither gave any signal nor stopped the train, and, according to the conductor, they did not apply the air-brakes until "right near the crossing, possibly right on it." We must hold that there is sufficient evidence to support the verdict, and consequently that there was no error in refusing to nonsuit the plaintiff or direct a verdict in favor of the defendant, or to set aside the verdict for want of evidence. What has been said above, and the authorities cited, fully dispose of the real controversy on this appeal, and also of the first, second, fifth, sixth, and seventh assignments of error in the charge.

Error is also assigned to that portion of the charge wherein the jury were, in effect, told (3) that although the statute did not require the defendant to blow the whistle at the whistling post, or at any place between it and the crossing, still, if those in charge of the train saw the plaintiff approaching the crossing and about to go upon the track, believing that he was unaware of the train's approach, it would be their duty to sound the whistle as well as to take every other reasonable precaution to prevent the collision. This portion of the charge is fully sustained by the recent ruling of this court in *Heddles v. C. & N. W. R. Co.* 74 Wis. 248, 249.

Error is also assigned to that portion of the charge

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wherein the jury were, in effect, told (4) that it was the peculiar province of the jury to decide whether the whistle was blown at the whistling post, or the engine bell rung before and while passing over the crossing in question, as well as the rate of speed at which the train approached the same. We perceive no error in submitting such questions to the jury, when taken in connection with the whole charge, which was fair to both parties and covered the whole case.

By the Court.— The judgment of the circuit court is affirmed.

HUNT and wife, Respondents, vs. ROONEY: COLEMAN, Appellant.

May 26 — June 21, 1890.

Mortgages: Accounting: Parties: Reversal of order refusing to make person a party: Vacating judgment.

1. In an action by mortgagor against mortgagee for an accounting and to have the mortgage debt adjudged paid, a surety on the mortgage note who, to the knowledge of the mortgagor before the action was commenced, had been compelled to pay said note and had thereby become the owner of the mortgage debt, is a necessary party and is entitled to come in and defend without terms.
2. The reversal of an order denying to such surety the right to become a party except upon terms which he refused to comply with, operates to vacate a judgment in favor of the plaintiff.

APPEAL from the Circuit Court for *Crawford* County.

The appeal is by *Martin Coleman* from the judgment in the action granting to the plaintiff the relief demanded in the complaint, and also from the following order theretofore made:

"[Title.] The above-entitled action having been called for trial in its regular order upon the calendar at the November general term of said court for the year 1886, and

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one *Martin Coleman*, a stranger to the record in this action, having appeared by Messrs. Webster & Miller, his attorneys, and applied to the court upon an affidavit filed to become a party defendant in this action and to defend the same in his own behalf, but applied at the same time for a continuance of the action for the purpose only of putting in an answer; and it appearing to the court by the admitted statement of counsel that said *Martin Coleman* was fully aware of the existence of this action long prior to this term of said court, and had ample opportunity to make and tender an answer herein and prepare for trial at this term of said court: Now it is hereby ordered that the said *Martin Coleman* may be made a party defendant in this action and be admitted to defend the same in his own behalf upon the following terms, namely: That the said *Martin Coleman* pay to the plaintiff's attorney *instanter* the sum of ten dollars terms, together with the witness fees of plaintiff's witnesses incurrcd at this term; and that upon such payment said action be continued for the term, and that said *Martin Coleman* have twenty days from this day in which to make and serve an answer in this action, but that in default of such payment the plaintiff may proceed at once with the trial of this action. Done in open court at the November general term of said court for the year 1886, and dated this 13th day of November A. D. 1886. By the court. GEO. CLEMENTSON, Judge."

Other facts will appear from the opinion.

For the appellant there was a brief by *Webster & Miller*, and oral argument by *D. Webster*.

For the respondents the cause was submitted on the brief of *Fuller & Ward*.

COLE, C. J. In April, 1880, the plaintiff *W. B. Hunt* borrowed from the defendant $300, payable in one year, with interest at ten per cent. He gave a promissory note for

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the amount, which was signed by one *Martin Coleman* as surety. To secure the payment of this note, *Hunt* and wife conveyed, by warranty deed, certain real estate, with the understanding that Rooney should execute a contract of the mortgaged premises to *Mrs. Hunt*, conditioned to reconvey the real estate to her upon payment of the money so borrowed. It appears that Rooney never executed this contract, but the evidence is entirely clear and satisfactory that the deed given was to secure the payment of an indebtedness, and must therefore be regarded as a mortgage. When the note became due *Hunt* had not the money to pay it, and it was arranged between the parties that the possession of the mortgaged premises should be delivered to Rooney through *Coleman*, his agent, and the rents received should be applied to the payment of the mortgage debt. So the matter stood until the commencement of this action, in October, 1886, which is brought to compel an accounting of the rents and profits, and to have the deed in question declared a mortgage, and the indebtedness which it was given to secure adjudged fully paid and discharged. Rooney was the only party made defendant, for whom an appearance was entered by Mr. Evans, as his attorney. A question was made on the argument as to whether the evidence showed that Evans was authorized to appear for Rooney and accept service of the summons and complaint in the action; but the court found, in effect, that he had such authority, and we shall assume that he had, without any inquiry as to the fact.

When the cause was called for trial, *Coleman* applied by his attorney to be made a party to the action and have leave to answer. His application was based upon his affidavit that he signed the note as surety for *Hunt*, and that he had been compelled to pay it, and should be subrogated to the rights of the defendant Rooney in the note and mortgage, and that the plaintiff well knew all the facts in

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the affidavit stated before the commencement of the action. The circuit court ordered that *Coleman* be made a party defendant, and be allowed to defend the action, on payment to the plaintiff's attorney of $10 *instanter*, together with the fees of plaintiff's witnesses incurred for the term. *Coleman* refused to comply with the terms, and was not made a party to the action. The cause went to a final judgment, and *Coleman* has appealed from such judgment and from the order denying him the right to defend except upon the terms prescribed.

In the first place, we will consider the order; and we are clear that *Coleman* should have been allowed to defend without terms. If the facts set forth in his affidavit are true,—and they are not denied,—he was the owner of the note and mortgage, and was the real party in interest. There could be no proper accounting as to rents and profits without his being before the court. As he was an absolutely necessary party, he was entitled to come in and defend without terms. The court should have ordered him to be made a party at once, if he had not applied, as it is plain there could not be a full determination of the controversy without his being before the court.

It is suggested that it was in the discretion of the court, under the circumstances, to prescribe the terms on which *Coleman* should be allowed to answer. We do not think the court had any discretion in the matter, as *Coleman* was not asking a favor of the court, but a right secured to him by law. As the owner of the mortgage debt, he was, as we have said, a necessary party defendant, and he had the right to defend the action like any mortgagee in a suit of this character. How was it possible to have an accounting of the rents and profits without the party in interest being before the court? As well might a mortgagee attempt to foreclose his mortgage without bringing in the mortgagor or the owner of the equity of redemption. Rooney was not only a proper, but perhaps was a necessary, party in

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this action for an accounting; for it does not appear at what time *Coleman* paid the note and became subrogated to his rights in the mortgage debt. But it is very clear that *Coleman* was also a necessary party to the account.

The rule is elementary that all parties whose interests are to be affected or concluded by the decree should be made parties to a suit of this nature. Where the mortgagee has assigned his whole interest in the debt, he may not be a necessary party, but where he retains an interest in it he is a necessary party as well as the assignee. Story, Eq. Pl. § 191. Since it does not appear when he parted with his interest, nor what amount of rents, if any, he received while he held the mortgage debt, it was proper he should be before the court in taking the account. And it was equally essential and necessary that *Coleman*, the owner of the mortgage debt, should be before the court when the debt was adjudged satisfied and paid. No terms should have been imposed as a condition to his being made a party defendant. It seems a violation of the most obvious and familiar principles of law to state the account and discharge the debt in his absence from the record. We are at a loss to understand how any effect can be given the judgment rendered under such circumstances. *Coleman* should be brought in and have his rights in the subject matter of the controversy investigated and adjudged before the relief asked in the complaint is granted. It is suggested, as he is a stranger to the record, he could not appeal from the judgment. But he has appealed from both the order and judgment. We hold that the order denying him the right to become a party defendant, except upon the terms stated, was erroneous. This necessarily operates to vacate the judgment.

By the Court.— The order and judgment are therefore reversed and vacated, and the cause is remanded to the circuit court for further proceedings in accordance with this opinion.

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COLEMAN, Appellant, vs. HUNT and others, Respondents.

May 26 — June 21, 1890.

Practice: Limiting trial to single issue: Judgment, upon whom binding.

1. Where several defenses, including a former adjudication, are pleaded, the trial should not be confined to the issue as to such former adjudication.
2. A judgment is not binding upon a person not a party to the action and whose application to be made a party had been granted only upon conditions which the court had no right to impose and with which he refused to comply.

APPEAL from the Circuit Court for *Crawford* County.

Action to foreclose a mortgage. The separate answers of the defendants set up several defenses, including payment and a former adjudication of the matters mentioned in the complaint. The facts will sufficiently appear from the opinion. The plaintiff appeals from a judgment dismissing the complaint.

For the appellant there was a brief by *Webster & Miller*, and oral argument by *D. Webster*.

For the respondents the cause was submitted on the brief of *Fuller & Ward*.

COLE, C. J. After the action of *Hunt v. Rooney*, *ante*, p. 258, had gone to judgment in the circuit court, the plaintiff commenced this action to foreclose his mortgage. All the defendants except Rooney answered, setting up the proceedings in the case of *Hunt v. Rooney*, and claiming that the judgment therein was a bar to this action. On the issues made by the pleadings the case came on for trial, and it appearing to the court, as the record in substance recites, that the matters set up by the defendants as a prior adjudication and in bar to the plaintiff's action might determine the entire controversy, the court decided

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to hear the evidence bearing upon that issue first, and practically confined the trial to that issue alone, without going into the other issues.

It is obvious that the case was for trial upon the merits, and all competent testimony offered to prove the issues formed should have been received and considered. It was error to confine the trial, as was done, to the plea in bar. And in regard to that defense we will say that we are unable to understand how the adjudication in the suit of *Hunt v. Rooney* could conclude the plaintiff herein as to any facts. He was not a party to that suit, and his application to be made a party and try the issues therein involved was denied, except upon his complying with the terms which the court had no right to impose. True, we have held that he was an indispensable party to the accounting in that suit, because he claimed to be the owner of the mortgage debt, and therefore he should have been before the court; but he was not brought in in fact. He was not even served with process in that suit; had no opportunity to make a defense as to the facts there alleged on the part of the plaintiffs, except upon the condition we have stated. Consequently, we are at a loss to know what principle of law or justice can be said to bind him by the judgment in that case. It is a fundamental principle of our jurisprudence that a personal judgment only concludes the parties and their privies. It is true, here, the plaintiff claimed to have purchased the note and mortgage from Rooney; but that was long prior to the commencement of the suit of *Hunt v. Rooney*. He was not so identified in interest with Rooney, nor did he stand in any such relation to him as to be concluded by that litigation. It appears to us it would be monstrous to hold, under the facts and circumstances, that the plaintiff was bound by the judgment in that case. Still the learned circuit court did so decide, doubtless because it supposed or treated the case as though *Coleman* were a party. But such

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was not the correct view of his position. *Denny v. Bennett*, 128 U. S. 490. He did not become a party, but declined to comply with the terms which the court imposed. He was certainly entitled to come in and defend as a matter of right, without terms, like any defendant to an action.

Some stress seems to be laid in the court below, and is pressed on the argument here, upon the fact that no assignment or transfer by Rooney of his interest in the mortgage debt to *Coleman* had ever been filed or recorded in the register's office; and hence it is assumed that *Coleman* should be deemed a purchaser *pendente lite*, and bound by the proceedings in the action of *Hunt v. Rooney*, to the same extent and in the same manner as if he were a party thereto, under the last clause of sec. 3187, R. S. But it does not appear that any written assignment was ever made by Rooney, though it is alleged in the complaint in this action that the note and mortgage were delivered to the plaintiff, and that he is the sole owner thereof. But the real facts, as to how and when the transfer was made by Rooney, or whether *Hunt* had notice thereof, could not be fully investigated in that case, and of course was not in this. As the court below held that the facts set forth in the plea of a former adjudication were proven, and that *Coleman* as well as Rooney was bound by the judgment in that case, that was conclusive of these questions. We think the court should have tried the whole case on the merits. Whether there is any fact which should estop the plaintiff from having a foreclosure of the mortgage, as against the defendants or either of them, can be more properly determined when all the evidence is before the court.

The judgment of the circuit court is reversed, and the cause must be remanded with directions to that court to try the case on the merits, unless the plaintiff should choose to come in and make his defense in the other action, in

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which event any further trial in this case would be unnecessary.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to proceed in accordance with this opinion.

FRITSCHE, Respondent, vs. FRITSCHE, Appellant.

May 26—June 21, 1890.

Easements: Right of way: Ambiguity in grant: Practical construction: Alteration of boundaries by re-survey.

A right of way from the land of the grantee to a public road was, by the terms of the grant, to be "on or near" a certain boundary line which, at the nearest point (its eastern end), was about twenty rods south of the road. As located by the grantor and used by the grantee for many years, the right of way began to diverge from said boundary line at the western end thereof, and reached the road at a point about north of the eastern end. A re-survey afterwards established the boundary line about three rods further south than the parties had supposed it to be. *Held*, that the grantee was still entitled to the right of way as originally located and used, and that the grantor could not compel him to follow a route nearer to said boundary line. The grantee was also entitled to a right of way over said three rods by the shortest practicable route.

APPEAL from the Circuit Court for *Crawford* County.

This action was brought to recover damages for the obstruction by the defendant of a private right of way of the plaintiff. In the year 1874, and before that time, the parties owned in common certain lands in Crawford county. In that year they agreed upon a partition of such lands, and carried out their agreement by the execution of mutual conveyances in accordance therewith. The conveyance by *Charles Fritsche*, the defendant, to the plaintiff, *Henry Fritsche*, contains the following grant: "The right of way from

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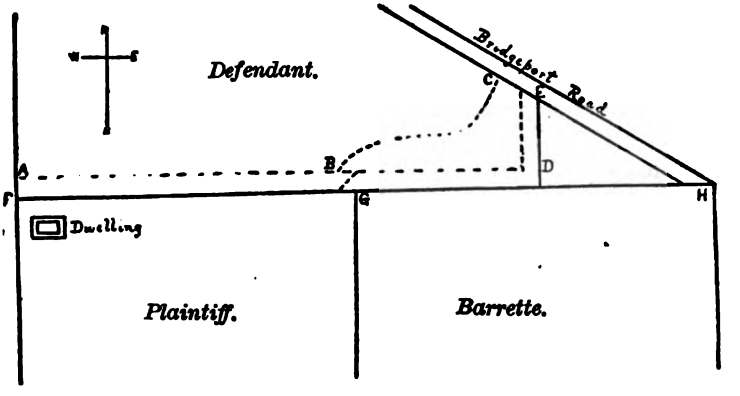
Henry Fritsche's residence to the Bridgeport road, on or near the line between *Charles Fritsche* and Peter Barrette." The land over which such right of way runs belongs to the defendant. The following plat, as hereinafter explained, sufficiently shows the location of the right of way, and the objects or monuments mentioned in the grant:



In 1875, *Charles* erected a fence on the dotted line A B C. At that time the parties supposed the line A B D was the boundary between their respective lands and those of *Charles* and Barrette. The fence diverged from such supposed boundary line at the point B, then supposed to be Barrette's corner, and curved north, and then east, around or up a hill to the Bridgeport road at C. *Henry* used and enjoyed his right of way along the south side of this fence to the Bridgeport road, uninterruptedly, and without objection on the part of *Charles*, until 1885. In that year it was found by a survey of the lands of the parties, which is admitted to be correct, that the dotted line A B D is not the true boundary between the lands above mentioned, but that such boundary line is about three rods south thereof, on the line F G H. Thereupon, in 1886, *Charles* removed the fence A B C south, and placed it on the true boundary line just mentioned, from the point F nearly to G, and then

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deflected it on his own land northeast, to about the line B D, and extended it east nearly to the point D, thence north to E; leaving a way for *Henry* between the fence and Barrette's north line and defendant's east line, to the Bridgeport road at E. *Henry* insisted upon his right to use the old way, and removed the fence, which prevented him from doing so, at G, near Barrette's corner. *Charles* restored the fence, and thereupon *Henry* brought this action to recover damages for thus closing the old way. The foregoing facts appear from the pleadings and proofs.

The jury found for the plaintiff, and assessed his damages at a nominal sum. A motion on behalf of defendant for a new trial was denied, and judgment for the plaintiff entered pursuant to the verdict. The defendant appeals from the judgment.

For the appellant there was a brief by *Webster & Miller*, and oral argument by *D. Webster*.

For the respondent the cause was submitted on the brief of *Fuller & Ward*.

LYON, J. There is no controversy concerning the plaintiff's right of way from his residence to Barrette's corner, point G. He travels upon his own land to that point, and is content to do so. The question in controversy is whether he has a right of way from that point to the old way at B, and along the same to the Bridgeport road at C, or whether such right of way extends from G to D, between the plaintiff's fence and Barrette's north line, to a point near defendant's east line, and from thence north, along that line, to the Bridgeport road at E.

The terms of the defendant's grant of the right of way to the plaintiff are somewhat ambiguous in respect to the location thereof. The location therein specified is "on or near the line between *Charles Fritsche* and Peter Barrette." The Bridgeport road on defendant's land, at the nearest

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point, is probably about twenty rods distant from the boundary line between the lands of the defendant and Barrette. Hence, to answer the calls of the grant, the right of way in question would necessarily have to diverge that distance from such boundary line. The question is, Where shall such divergence commence? Does it commence near the points, G and B, as claimed by plaintiff, or near point D, as claimed by the defendant? Its extension to the Bridgeport road at either point is "near" the boundary line mentioned in the grant, within its obvious intent and meaning, and fulfills the terms and requirements thereof.

By erecting the fence between B and C, in 1874, the defendant fixed the northern limit of the right of way. He also permitted the plaintiff, without objection, to use and enjoy the same along the south side of the fence contiguous thereto, for many years. Thus, by his own voluntary act and long acquiescence, the defendant gave a construction to his grant, and practically explained the ambiguity in its terms. The plaintiff adopted that construction by constantly using such right of way from B to C along the south side of the fence. It must be held that such right of way is established on that line.

It cannot be doubted that the plaintiff has a right of way over some line from his own land to point B, for without it he would have no use of such right from B to C. Over what line may he exercise this right? The answer seems plain. He may exercise it over the shortest practicable line extending from his own land to point B. This is a reasonable adjustment of the rights of the parties to the altered conditions growing out of the correction of the boundary line, because it saves the grant, and at the same time does the least possible injury to the defendant. The defendant has obstructed such line by erecting a fence across it, and has thus deprived the plaintiff of his right of way. Hence the latter is entitled to recover in this action, and

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the judgment in his favor for nominal damages should not be disturbed.

The material facts in the case being practically undisputed, and the right of the plaintiff to recover in the action being clear, the numerous exceptions taken by the defendant on the trial are of no importance and will not be determined.

By the Court.— The judgment of the circuit court is affirmed.

FRITSCHE, Respondent, vs. FRITSCHE, Appellant.

May 26 — June 21, 1890.

Easements: Ejectment.

An action of ejectment cannot be maintained to recover a mere easement.

APPEAL from the Circuit Court for *Crawford* County.

The case is stated in the opinion.

For the appellant there was a brief by *Webster & Miller*, and oral argument by *D. Webster*.

For the respondent the cause was submitted on the brief of *Fuller & Ward*.

LYON, J. This is an action of ejectment brought to recover a private right of way claimed by the plaintiff on certain lands of the defendant. The right thus claimed was established by the judgment of this court affirming the judgment of the circuit court in an action at law brought by the plaintiff against defendant for obstructing such right of way. The opinion in that action is filed herewith. See *Fritsche v. Fritsche*, *ante*, p. 266.

After the judgment of the circuit court for the plaintiff was entered in that action, affirming the existence of such

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right of way, the defendant again obstructed the same at the same point, and thereupon this action of ejectment was brought to recover such right or easement. The circuit court held that the judgment in the former action is *res adjudicata* of plaintiff's right, and thereupon gave judgment herein in his favor, from which the defendant appeals. The ruling was doubtless correct, and the judgment would also be correct if ejectment could be maintained to recover a mere easement. But it is well settled, both on principle and by authority, that the action cannot be maintained for such purpose. It was so held in *Racine v. Crotsenberg*, 61 Wis. 481. The subject is there quite fully considered, and it is unnecessary to repeat the discussion here. The remedy of the plaintiff is by action at law for damages, or, if the wrong be persisted in, by a suit in equity for an injunction.

By the Court.— The judgment is reversed, and the cause will be remanded with directions to the circuit court to dismiss the complaint.

MILLER, Plaintiff in error, vs. THE STATE, Defendant in error.

May 27 — June 21, 1890.

Criminal law: Time for settling bill of exceptions.

The bill of exceptions in a criminal action must be settled and signed within the time limited for the issuance of a writ of error, *i. e.*, within two years after the entry of judgment.

ERROR to the Municipal Court of *Milwaukee* County.

The cause was submitted for the plaintiff in error on the brief of *David S. Rose* and *Bradley G. Schley*, and for the defendant in error on that of the *Attorney General* and *L. K. Luse*, Assistant Attorney General.

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TAYLOR, J. The plaintiff in error was convicted of murder in the second degree, and judgment was rendered against him on the 27th of October, 1887. A writ of error was issued on the 24th of September, 1889. A bill of exceptions was settled and signed by the judge of the court in which the defendant was tried, on the 3d day of January, 1890.

The only error assigned by the learned counsel for the plaintiff in error for the reversal of the judgment in this case is that the court improperly allowed one H. J. Killilea, Esq., to appear as counsel to assist the district attorney in the prosecution of the said plaintiff in error, although he was employed and retained by private parties for a compensation to be paid by such private parties, which fact the accused offered upon the trial to prove, and made objection to the said counsel appearing and assisting in said action. It is alleged that the court refused to hear the evidence offered, and permitted the said counsel to assist the district attorney in the prosecution of the said action against the plaintiff in error.

Upon the case being called for argument in this court, the learned attorney general moved to strike the bill of exceptions from the files in the case, for the reason that it was not settled and signed within two years after the entry of the final judgment in the action. The motion of the attorney general, we think, must be granted. This court held in *Evans v. St. Paul F. & M. Ins. Co.* 54 Wis. 522–524; *Vroman v. Dewey*, 22 Wis. 362; and *Bonesteel v. Bonesteel*, 30 Wis. 151–153,—that the bill of exceptions in civil actions must be settled within the time limited for an appeal in such actions, which is two years after the entry of the judgment in the action. By sec. 3039, R. S., a writ of error to reverse a judgment in a civil action must also be issued within two years after the entry of the judgment; and by sec. 4724, R. S., a writ of error in a criminal action must be issued, and bill of exceptions served and settled, within the

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time prescribed for issuing and settling the same in civil actions. Under the decision in 54 Wis. 522–524, the bill of exceptions could not be legally settled and signed after the expiration of the two years from the date of the judgment. The motion to strike it from the files must be granted.

The bill of exceptions having been stricken from the files, there is nothing in the record showing the proceedings upon which the plaintiff in error relies for reversing the judgment.

By the Court.—The judgment of the municipal court of Milwaukee county is affirmed.

SISSON, Plaintiff in error, vs. THE STATE, Defendant in error.

May 27 — June 21, 1890.

Criminal law: Writ of error: Record.

On a writ of error in a criminal case, where no bill of exceptions has been settled and returned to this court, nothing can be considered except the sufficiency of the information and verdict and the judgment thereon.

ERROR to the Circuit Court for *Winnebago* County.

The cause was submitted for the plaintiff in error on the brief of *Clarke & McAuliffe*, and for the defendant in error on that of the *Attorney General* and *L. K. Luse*, Assistant Attorney General.

TAYLOR, J. This is a writ of error issued out of this court to the circuit court of Winnebago county, to bring up for review the judgment and proceedings in the case of the state of Wisconsin against the said *Henry Sisson*. The return to the writ of error shows that an information was filed by the district attorney of said county in the circuit

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court of Winnebago county on December 21, 1885, charging the said *Henry Sisson* with a felonious assault upon one Joseph Alger with intent to murder the said Alger, and in a second count charging the said *Sisson*, at the same time and place, with a felonious assault upon the said Alger with intent to do the said Alger great bodily harm.

There is no contention but that the information charges in proper form the crime—*first*, of a felonious assault with intent to murder the said Alger; and, *second*, of a felonious assault with intent to do great bodily harm to the said Alger. The return also shows that the jury returned a verdict in the following language: "We find the defendant guilty of assault with intent to do great bodily harm, as charged in the second count in the information." The record returned also shows that, on the petition of the defendant, certain witnesses were ordered to be summoned by the state to give testimony for the defendant on the trial in said circuit court. There also appear in said return certain instructions of the court to the jury in said action; also, the sentence and judgment of the court upon the verdict rendered by the jury, adjudging that the defendant be punished by imprisonment in the state prison at hard labor for the term of one year, and to solitary confinement during said term for the space of one day, the time of sentence to begin January 15, 1886. The record returned also contains the certificate of the warden of the state prison that the plaintiff in error was received into said prison under said sentence on the 16th day of January, 1886. The return further contains what purports to be the evidence taken before the justice of the peace on the preliminary examination before said justice, but none of the evidence produced upon his trial in the circuit court; and, finally, the return to the writ contains an affidavit made by John W. Hume on the 9th day of January, A. D. 1886, setting forth divers alleged irregularities in the proceedings

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on the trial, and irregularities in the conduct of the jury; and upon such affidavit and the minutes of said court a motion was made in writing on the same day to set aside the verdict and for a new trial, alleging various errors and irregularities on the trial and in the proceedings in said action. Whether this motion was ever presented in fact to the court, or whether any decision was made by the court upon such motion, does not appear from the return to said writ.

There is no bill of exceptions attached to or made a part of the return to such writ of error, and none appears to have been made or settled and returned to this court. There is nothing, therefore, for this court to pass upon except the sufficiency of the information and the sufficiency of the verdict, and the judgment thereon. No complaint is made as to the sufficiency of the information, the verdict, or the judgment thereon. See *Chase v. State*, 50 Wis. 510, 512. None of the questions raised and discussed by the learned counsel in their briefs in this action are properly before this court upon the record of the case as returned to this court. It is said in their brief that, after the jury were impaneled and sworn, the defendant, by his counsel, asked that the district attorney be required to elect upon which count of the information he would proceed to trial, and that such motion was denied and exception taken. The record, as returned to this court, does not disclose that any such motion was made on the trial, or that the court overruled such motion. This court cannot, upon this hearing, pass upon the question whether the court should or should not have compelled the district attorney to elect upon which of the two counts he would proceed to trial against the defendant. As to what the rule is in such cases, see *State v. Fee*, 19 Wis. 562, 565.

By the Court.— The judgment of the circuit court is affirmed.

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BIRD, Plaintiff in error, vs. THE STATE, Defendant in error.

May 27 — June 21, 1890.

CRIMINAL LAW AND PRACTICE. (1) *Counsel to assist district attorney: Renouncing private employment.* (2) *Grand jury: Trial upon indictment or information.* (3) *Self-defense: Calling upon by-standers.*

1. It was not error for the trial court to appoint, as counsel to assist the district attorney in a prosecution for murder, an attorney who had been retained by the father of the deceased to assist in such prosecution, but who had received no compensation and, before his appointment by the court, renounced such employment.
2. Ch. 140, Laws of 1889, amending sec. 2545, R. S., and providing that "grand jurors shall be summoned to attend each term of the circuit court unless the judge thereof shall make, . . . at least fifteen days before the sitting of the said court, an order in writing directing such jury not to be summoned," did not apply to a term of court commencing less than fifteen days after the act took effect; and, although such order was not made, a person might be tried at such term for murder upon an information.
3. An assaulted party is not bound to call upon by-standers to restrain his assailant from making a threatened attack before making personal resistance to such attack.

ERROR to the Circuit Court for *Crawford* County.

The facts are stated in the opinion.

For the plaintiff in error there was a brief by *Frank W. Burnham*, attorney, and *John D. Wilson*, of counsel, and oral argument by *Mr. Wilson*.

The *Attorney General*, *L. K. Luse*, Assistant Attorney General, and *Michael Murphy*, district attorney of Richland county, for the defendant in error.

TAYLOR, J. The plaintiff in error was arrested and charged with the murder of one Oscar Hallin on the 6th day of February, 1889, in the saloon of one William Brandt, in the city of Richland Center, in the county of Richland. The plaintiff in error, after his arrest, waived an examination

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before the justice, and at the next term of the circuit court for Richland county, in April, 1889, the district attorney of said county filed an information against him in said court charging him with the crime of murder. The defendant was duly arraigned in said court upon said information, and pleaded not guilty to the charge contained in the information; and thereafter, upon the application of the said plaintiff in error, the place of trial was changed to Crawford county. At the May term of the circuit court for Crawford county the plaintiff in error was tried upon said information; and upon such trial the jury, by their verdict, found the said plaintiff in error guilty of the crime of murder as charged in the information. After such trial, and before judgment rendered, the plaintiff in error moved in arrest of judgment, and also for a new trial. The motion was denied, and thereupon the court sentenced the plaintiff in error to imprisonment in the state prison for life. A bill of exceptions was settled in the case, as provided by statute, and a writ of error was issued from this court to review the proceedings and judgment in the court below.

Upon the argument in this court the learned counsel for the plaintiff in error alleges several errors on account of which he claims the judgment should be reversed.

The first error alleged is that the circuit judge erred in appointing T. J. Brooks, Esq., an attorney of said court, to assist the district attorney in prosecuting the action against the defendant. The ground of this objection is based upon the alleged fact that said Brooks had been retained by the father of the deceased to assist in the prosecution of the plaintiff in error before he was appointed for that purpose by the court. Mr. Brooks, before he was appointed by the court, was examined by the court, and made the following statement: "Mr. Hallin [meaning the father of the deceased] stated to me that he wished me to take part in the

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prosecution, and expected to pay me for it. At that time I was not aware of the decision of the supreme court precluding any private employment to assist in the prosecution of a criminal case, and I afterwards told him that I could not assist in the prosecution without an appointment by the court. If I am appointed to assist in the prosecution, I want no pay except such compensation as is provided by law in such cases. No money was paid to me by Mr. Hallin, and he does not expect to pay me a cent. At least, I have no expectation of being paid anything for what I do in this case."

The right of private counsel to appear and assist in the prosecution of a criminal action, against the consent of the accused, and without an appointment made by the trial judge, was discussed by this court in the case of *Biemel v. State*, 71 Wis. 444. In that case this court held that, "since the legislature has given the trial judge the power of appointing assistant counsel where he thinks the public interest requires it, and providing that such assistant counsel shall be paid out of the public funds, counsel should not be permitted to appear in the case, even at the request of the district attorney, when it appears that such counsel has been employed to appear by private parties, at whose request such counsel appears in the case, *and from whom he expects to receive compensation for his services.*" This court also said in that case that "had the learned judge of the municipal court, acting under the authority of ch. 354, Laws of 1887 [the statute which authorizes the judge, in his discretion, to appoint assistant counsel], appointed Mr. Austin as counsel to assist the district attorney in the prosecution, notwithstanding his previous employment by private parties, and Mr. Austin had accepted such appointment, and acted under it, a different question would be presented. It might be urged that in such case the acceptance of the appointment by the counsel and acting under it would be a

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renunciation of his previous employment, and his services thereafter rendered would be solely for the state, and the only compensation he could legally demand would be that provided by the act of 1887."

In the case at bar, Mr. Brooks, before his appointment, had renounced his employment by the father of the deceased, and all claim upon him for compensation, in the prosecution of the action; and he accepted the appointment by the court with a clear understanding that he should receive no other compensation for his services than he was entitled to under such appointment and the act of 1887. The act of 1887 leaves it in the discretion of the trial judge to appoint or not appoint assistant counsel, and the judge must exercise his discretion in the selection as well as in the appointment of such assistant counsel. We see nothing in the appointment of Mr. Brooks, under all the circumstances, which would justify this court in holding that the learned circuit judge has abused his judicial discretion in making such appointment.

It is also urged as error that the defendant was tried upon an information and not upon an indictment. Originally, under the constitution of this state, no person could be tried for a felony except upon an indictment of a grand jury. See original sec. 8, art. I, of the constitution; 1 S. & B. Ann. Stats. 38. The section was amended in 1870 so as to read as follows: "No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself. All persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it." By this amend-

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ment the words "without due process of law" were substituted for the words "unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia when in actual service in time of war or public danger." After the amendment of the constitution in 1870, the legislature prescribed the methods of proceeding against persons guilty of crimes against the state by ch. 137, Laws of 1871, which was afterwards embodied in the Revised Statutes of 1878 as ch. 188 of said statutes; and by sec. 31 of said ch. 137, Laws of 1871, the grand jury was practically abolished. See sec. 2545, R. S. 1878. By the amendment of sec. 2545, R. S. 1878, by sec. 5, ch. 140, Laws of 1889, grand juries are to be summoned as before the amendment to the constitution and the enactment of ch. 137, Laws of 1871, "to attend each term of the circuit court, unless the judges thereof shall make and file with the clerk, at least fifteen days before the sitting of the said court, an order in writing directing such jury not to be summoned."

It is claimed by the learned counsel for the plaintiff in error that, as the law now stands, no one can be proceeded against by information filed at any term of the circuit court at which a grand jury must be summoned as provided by said amended sec. 2545, R. S. We do not feel called upon in this case to decide the question raised by the learned counsel by this objection. The term of the court at which this information was filed commenced less than fifteen days after the act amending sec. 2545, R. S., went into effect. It was impossible, therefore, for the judge to make the order required by the amendment to prevent the calling of a grand jury at that term; and we conclude that the amended law did not apply to the term of court held at which this information was filed. We think the legislature only intended the law to apply to such terms of the several

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circuit courts of the state as should be held more than fifteen days after the law took effect, so that the several judges might exercise their discretion in directing a grand jury not to be called at such term.

The third error assigned, that the verdict is not supported by the evidence, we think should not prevail. It was clearly a question for the jury whether the act was justifiable homicide, or murder in the first degree, or manslaughter in some of the degrees. Upon the whole evidence, these questions were peculiarly for the jury, and a verdict rendered under proper instructions of the trial judge could not be reversed by this court as unsupported by the evidence.

Several objections were taken to the instructions of the learned circuit judge to the jury, at least one of which, we think, was well taken. The contention made by the defendant on the trial was: *First*, that he killed the deceased in self-defense, in resisting a dangerous assault made upon him by the deceased, and was therefore guilty of no crime; and, *second*, that, if he was not justified in killing the deceased, the killing was done in the heat of passion, without intent to kill. There was evidence given on the part of the defendant which tended, at least, to sustain the contention made by him. In this state of the evidence, it was highly important to the defendant that the learned trial judge, if he undertook to instruct the jury particularly under what circumstances the defendant would be justified in resisting the assault made upon him by the deceased, by using a deadly weapon, should make no mistake in stating such circumstances. Upon this point the learned circuit judge instructed the jury at considerable length, and, as we think, none too favorably to the defendant, and finally closed his remarks upon this question with the following language:

"By imminent danger, in such case, must be understood a danger so great that the use of such deadly weapon in de-

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fense is the only apparent reasonable way to prevent such apprehended great personal danger.

"If such person is assaulted in the manner supposed and can by retreating escape the danger, he is bound to do so rather than use a weapon likely to kill; or, if there be by-standers upon whom he may call to prevent the threatened assault and battery which may as to him mean great personal injury, he should, if there be time, call upon them to restrain the aggressor, before resorting to fire-arms.

"In short, in no case can one, in order to prevent a threatened assault and battery with the fist, no matter what may be the difference in size or strength between the parties, resort to a deadly weapon in his defense until he has done all that, under the circumstances, he reasonably otherwise could for his protection."

Without considering whether the first and third paragraphs of these instructions were properly given to the jury, and after a careful consideration of the matter, we are all agreed that so much of the second paragraph as instructs the jury that "*if there be by-standers upon whom he may call to prevent the threatened assault and battery which may as to him mean great personal injury, he should, if there be time, call upon them to restrain the aggressor, before resorting to fire-arms,*" was erroneous. Under the evidence in the case, the learned judge by this instruction, in effect charged the jury that the defendant had failed to show any sufficient reason on his part for firing upon the deceased in the manner he did. The evidence clearly showed that there were several by-standers present at the time of the assault by the deceased and the firing by the defendant; that the defendant did not call upon them to restrain the deceased or to protect the defendant; and the evidence tends, at least, strongly to show that the defendant had time to call for help against the assault of the deceased be-

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fore he fired upon him. This instruction and the third paragraph, together, virtually instructed the jury that the defendant was not justified, under all the evidence, in firing upon the deceased at the time he did so fire. While it might be proper to say to the jury that, in determining the question whether the accused was justified in firing upon his assailant, they might, among other things, consider the fact that the assault made upon him was made in the presence of a number of other men, who, it might be presumed, would not have permitted the deceased to inflict any great personal injury upon the defendant, we know of no rule of law, or of any judicial decisions, which make it the duty of the assaulted party to call upon the by-standers to restrain his assailant from making the threatened attack before making personal resistance to such attack. In this instruction we think the learned judge clearly erred in stating it as a proposition of law that it was the duty of the accused to call upon the by-standers to aid him in resisting his assailant before he could resort to resistance with a deadly weapon. As we are of the opinion that there was evidence in the case under which the defendant was entitled to have the question of his justification for killing the deceased submitted to the jury as a question of fact, we must hold that this error in instructing the jury was prejudicial to the rights of the defendant; and the judgment, for that error, must be reversed, and a new trial be had.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison will surrender the plaintiff in error to the sheriff of Crawford county, who will hold him in custody until he shall be discharged by due course of law.

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THE STATE EX REL. CHURCH MUTUAL INSURANCE COMPANY vs. CHEEK, Insurance Commissioner.

May 27 — June 21, 1890.

Constitutional law: Corporations: Special or private law.

Ch. 346, Laws of 1889, entitled "An act to enable members of the Methodist Episcopal Church, or of annual conferences, to form an insurance corporation, and to regulate the same," and which speaks throughout of but one organization, is *held* to authorize the formation of one corporation only, and hence to contravene sec. 31, art. IV, Const., prohibiting the legislature from enacting any special or private law "for granting corporate powers or privileges, except to cities."

MANDAMUS to the Commissioner of Insurance.

The following statement of the case was prepared by Mr. Justice CASSODAY:

February 25, 1890, the insurance company named filed its petition in this court alleging, in effect, that it was a corporation duly organized and existing under ch. 346, Laws of 1889; that it had completed its organization in due form of law, as required by that chapter, and had filed with said commissioner its articles of organization, as required thereby; that February 5, 1890, it filed with said commissioner due proofs of its proper organization, and that it had twenty-five *bona fide* applications for insurance, averaging at least $1,000 each, as required by said chapter, and then and there tendered to said commissioner a license fee of $10, and fully proved that all requirements of said act had been fully complied with, and then and there requested and demanded of said commissioner to issue a certificate to said petitioner to do business as such insurance company, and that it was duly organized and entitled to do business under the laws of this state; that said commissioner then and there refused, and still refuses, to issue

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such certificate; that said petitioner had no other remedy except by writ of *mandamus* to compel said commissioner to issue such certificate; and therein prayed the issuing of an alternative writ of *mandamus* for the purpose mentioned. On said February 25, 1890, such alternative writ of *mandamus* was issued from this court, returnable March 18, 1890. Upon the return day of such writ the said commissioner, by the attorney general, moved this court to quash said writ for the reason that the relation does not set forth sufficient facts to impose upon the commissioner the duty of issuing such license, nor any other duty in the premises; and that said ch. 346, Laws of 1889, is unconstitutional and void.

In support of the motion to quash there was a brief by the *Attorney General* and *L. K. Luse*, Assistant Attorney General, and oral argument by the *Attorney General.*

F. W. Hall, contra.

CASSODAY, J. This is an amicable, though real, controversy to determine the validity of ch. 346, Laws of 1889. It is said to be in violation of that portion of the amendment of 1871 to article IV of the constitution which provides that: "Sec. 31. The legislature is prohibited from enacting any *special or private* laws . . . (7) for granting *corporate powers or privileges*, except to cities. . . . Sec. 32. The legislature *shall provide general laws* for the transaction of any business that may *be prohibited* by section 31 of this article, and all such laws *shall be uniform in their operation* throughout the state." The act in question undoubtedly granted "corporate powers and privileges." This is virtually conceded by the learned counsel for the company. The real controversy is whether the act is a "special or private" law. If it is, then it is conceded to be repugnant to the constitutional inhibition quoted.

The purpose of the act is therein declared to be for "in-

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suring, upon the plan of mutual insurance, church and parsonage property against loss or damage by fire, lightning, or other casualties." The learned counsel for the company contend, in effect, that churches and parsonages are less exposed to such loss or damage than other property, and may therefore be safely insured at a cheaper rate, and hence that incorporations may be properly authorized for the sole purpose of taking such risks. There seems to be no valid objection to a reasonable classification of property with reference to such hazards, and the enactment of general and uniform laws, operative throughout the state, for the organization of insurance companies for such respective classes of hazards.

But the invalidity of the act in question is predicated upon other grounds. It is claimed that the act only authorizes one corporation, and limits the incorporators to persons having a certain religious belief; and hence, upon either of these grounds, is a special or private law, within the meaning of the constitutional provision quoted. It is entitled "An act to enable *members* of the Methodist Episcopal Church, or of annual conferences, to form *an insurance corporation*, and to regulate the same." The act throughout speaks of but one corporation or organization, and among other things, provides, in effect, that "any number of persons, not less than nine, who are residents of this state, and regular *members* of the Methodist Episcopal Church, or of an annual conference of said church, may form *a corporation* for the purpose" therein designated; that "the first nine persons signing the articles of organization shall be directors . . . until others are elected" (sec. 1); that "any church or church society, by its representatives, holding a policy in *this corporation* of the sum of $500, shall be a member of *this corporation*" (sec. 4); that the officers thereof make an annual verified statement of "*its* condition," and the "facts in regard to *its* business

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or condition" (sec. 6); that "every member of *this* organization" shall, in the event stated, "notify the secretary" (sec. 7); that "any member of *this* corporation may withdraw, etc." (sec. 9).

Such being the nature of the act, we must hold that its purpose and object was to authorize the incorporation and organization of only one corporation, and hence is the same in effect as though the act had incorporated the company directly. Such a law is manifestly a special or private law, within the rulings of this and other courts. *State ex rel. Sanderson v. Mann*, 76 Wis. 469; *Nichols v. Walter*, 37 Minn. 264; *Long Branch v. Sloane*, 49 N. J. Law, 356; *State ex rel. Richards v. Hammer*, 42 N. J. Law, 435. Under a similar constitutional provision in Nebraska, it was held by the supreme court of the United States that an act authorizing a school district to issue bonds for the purpose of erecting a school building, procuring a site therefor, and for setting apart a fund to pay the same, was unconstitutional and void. *School Dist. v. Insurance Co.* 103 U. S. 707. The case is clearly distinguishable from *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, cited by counsel. The attorney general cites Mr. Cooley to the proposition that "a statute would not be constitutional which should prescribe a class or a party for *opinion's sake*, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt." Cooley, Const. Lim. (5th ed.), 483, 484 (*391).

The view we have taken of the act renders it unnecessary to determine whether it is also "special or private" by reason of the fact that the corporators are limited to members of the church or conference named.

The wisdom of the constitutional provision in question is not open to debate. While it exists, it is the imperative duty of the courts to enforce it. We must hold that the act

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in question is a special or private law granting corporate powers and privileges, and hence is repugnant to the constitutional inhibition quoted, and is therefore void.

By the Court.— The motion to quash the alternative writ of *mandamus* is granted.

THE CITY OF JANESVILLE and another, Respondents, vs. CARPENTER, Appellant.

May 28 — June 21, 1890.

Watercourses: Riparian rights: Injunction: Constitutional law.

1. In an action to restrain the driving of piles in the bed of a river in a city, and the erection thereon of a building fronting on a bridge, a complaint alleging that the flow of water in the river has already been obstructed by bridges and other structures, that the erection of the building in question will lead others to erect similar buildings fronting on the bridges and supported in like manner, until the whole space over said river on both sides of the bridges is occupied thereby, and that by reason thereof the flow of water in the river will be further permanently obstructed, and the interests of the city and its inhabitants greatly prejudiced and injured by obstruction to the circulation of air, and in respect to the dangers of fire and flood and to the public health, and as respects equality of taxation and assessments and the benefits thereof, is *held* not to state a cause of action in favor of the city.
2. Nor does the complaint state a cause of action in favor of a mill-owner using the water-power furnished by the river, by alleging that the erection of the building by the defendant will cause the waters of the river to set back "to some extent" at the place where the water used to operate the mill is discharged again into the river, where no injury by reason thereof is alleged.
3. The fact that the erection of a building is prohibited by a municipal ordinance is not ground for an injunction against it.
4. Ch. 423, Laws of 1887 (providing that "it shall be unlawful and presumptively injurious . . . to persons and property to drive piles, build piers, cribs, or other structures . . . in Rock river within the limits of the county of Rock, and the doing of any such act

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shall be enjoined at the suit of any resident tax-payer without proof that any injury . . . has been or will be caused by reason of such act," and that "the doing of any such act shall also be enjoined at the suit of any owner or lessee of the right to use water of said river to operate any mill . . . within said county, without proof of any further fact than that such act will cause the water of said river to rise or set back to some extent at the place where the water used to operate said mill . . . is discharged into said river"), is unconstitutional and void:

(1) It deprives riparian owners of their property without compensation or due process of law, and without giving them any remedy, in violation of art. V, XIV, Amendments, Const. of U. S., and secs. 9, 13, art. I, Const. of Wis.

(2) It is a usurpation of the judicial power by the legislature, in violation of sec. 2, art. VII, Const. of Wis.

(3) It is discriminating and class legislation, in violation of the spirit of the constitution and contrary to public justice.

APPEAL from the Circuit Court for *Rock* County.

The case is stated in the opinion. The defendant appeals from an order refusing to dissolve a temporary injunction.

For the appellant there was a brief by *Winans & Hyzer*, and oral argument by *E. M. Hyzer*.

For the respondents there was a brief signed by *Wm. Ruger*, and oral argument by *J. B. Doe, Jr.*, and *Mr. Ruger*. They contended, *inter alia*, that upon the facts stated in the complaint a court of equity should grant an injunction, independent of any statute. *Williams v. Smith*, 22 Wis. 595; *Potter v. Menasha*, 30 id. 492; *Pettibone v. Hamilton*, 40 id. 415; *In re Eldred*, 46 id. 541; *Watertown v. Cowen*, 4 Paige, 510; *Rochester v. Erickson*, 46 Barb. 92; *Gillespie v. Forrest*, 18 Hun, 110; Wood on Nuisances, secs. 602, 779, 781; High on Injunctions, secs. 795, 813, 816, 818, 819, 834, 1555; Story's Eq. Jur. sec. 927. The following statutes are applicable: R. S. secs. 1596, 1607; Laws of 1882, ch. 221, subch. 4, sec. 3, par. 36; Laws of 1887, ch. 423. These statutes assume the right of the legislature to declare that Rock river, within the limits of the plaintiff city, is a navigable river

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and public highway. The power of the legislature so to declare is recognized by the decisions of this court. *Barnes v. Racine*, 4 Wis. 465–6; *Wis. R. Imp. Co. v. Lyons*, 30 id. 67; *State v. Carpenter*, 68 id. 171. The legislature also had the right to make the remedy by injunction legal or statutory relief. Cooley's Const. Lim. 361–2; *Andrews v. Farmers' L. & T. Co.* 22 Wis. 288; *Denner v. C., M. & St. P. R. Co.* 57 id. 218; *Stadler v. Grieben*, 61 id. 500.

ORTON, J. It is charged in the complaint as follows: Many years since a building known as the "Myers Building" was erected on the southerly side of and adjoining Milwaukee-Street bridge, in the city of Janesville, over the center of Rock river, as the same flowed in its natural state. Said building is forty feet in width, and is supported by large stone piers resting on the bed of said river, and which have so obstructed its flow as to cause a large sand-bar to form in said river, near to and on the down-stream side of the building. Within the period of three years last past, the defendant, *Edwin F. Carpenter*, erected a building south of and adjoining the southerly side of said bridge at or near its easterly end, forty feet in width, fronting on said bridge, and extending southerly over said river a distance of 100 feet, and supported by numerous piles driven into the bed of said river, the most westerly of which being in the channel of said river in or near the deepest water in the same, leaving a vacant space about eighty-seven feet in width between the westerly side of said building so erected by the defendant and the easterly side of said Myers building. The defendant threatens that he will, without the permission of or an order from the common council of said city, drive numerous piles into the bed of said river, and erect thereon a building south of and adjoining the southerly side of said Milwaukee-Street bridge, and extending from said building so heretofore erected by him, to said Myers

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building, and having a frontage of eighty feet or more on said bridge, and extending over and down said river for a distance of about 100 feet, and commenced the driving of piles in the bed of said river for such purpose. The consequences of permitting the defendant to so erect said building, as affecting the interests of the city of Janesville, *will be that others* will soon erect buildings fronting on said bridges, and supported in like manner, until the whole space over said river, on both sides of said bridges, is occupied by similar buildings fronting on said bridges, and extending up and down said river a distance of about 100 feet from the sides of said bridges; *and by reason thereof* the flow of the water in said river will be further permanently obstructed, and the interests of said city and its inhabitants greatly prejudiced and injured by obstruction to the circulation of air, and in respect to the dangers of fire and flood, and to the public health, and as respects equality in the matter of taxation and assessments and the benefits thereof; and that said building will be in violation of an ordinance of said city against erecting any buildings in said river. As affecting the interests of the other plaintiff, the *Janesville Cotton Mills*, it is alleged that the erection of said building will cause the waters of said river to set back "*to some extent*" at the place where the water used by said *Janesville Cotton Mills* is discharged into said river.

In the affidavit of Edward Ruger, a civil engineer, in support of the complaint, it is stated that said building would, *to some extent*, cause the water to set back to such place, and in his affidavit procured by the defendant it is stated that said building would cause the water to set back on the water-wheels of said *Janesville Cotton Mills* "*to some extent, but to what extent he could not then say, but it would be slight.*" It is alleged, also, that the *Janesville Cotton Mills* is a tax-payer of said city and a corporation, and that Rock river is a public highway, and has been returned as

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navigable, and has been meandered, and for a great many years a dam across said river, about seventy rods above said bridge, has existed by lawful authority, and that a considerable number of mills and factories have received their water-power therefrom, and among them the *Janesville Cotton Mills.*

The complaint shows also that, by the foundation of buildings and the building up within the natural margins of the river on the northerly side of the bridge, the width of the river has already been diminished one third, and the waters have been set back as far as the dam, and that said Milwaukee-Street bridge and Court-Street bridge have obstructed the flow of the river to a considerable extent, and that the abutments and piling thereof in the bed of the river, and the filling in of earth and other materials, and placing the foundations, walls, and piers for the support of buildings, and the throwing in of ashes and other materials in the bed of the river, have greatly obstructed the river between said bridges and other localities, and that there is danger that other buildings and obstructions will be placed in the river by the *example* of the defendant.

These are substantially the material allegations of the complaint on which the circuit court granted a temporary injunction against the erection of said building. The defendant, after answering said complaint, moved that the said injunction be dissolved. The motion was heard upon the pleadings and one affidavit presented by the defendant, and seven affidavits presented by the plaintiffs, and denied. From the order denying said motion this appeal is taken.

The answer denies all of the speculative and predicted consequences which the complaint alleges will follow the erection of said building, and the setting back of the water to any extent, and the effect as to the public health and danger from fire or flood, and the consequences of his pernicious example, and that the river is navigable in fact, and

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that the bridges are old and dilapidated and will soon be replaced by iron ones, and some other immaterial allegations; and the other allegations are admitted. The answer then alleges as follows: The Rock river throughout its whole length is crossed and obstructed by dams, bridges, and buildings and other structures, and within the city there have been maintained six bridges resting upon piers and piles, four of which were constructed by the city within the space of a mile and a half, and two of them within the space of forty rods. The lower bridge is known as "Court-Street Bridge," and is about forty rods below the proposed building, and its abutments and approaches are built within the river, and diminish its width so that it is twenty feet narrower at that place than where the defendant's proposed building will be, and three of said bridges are between two dams across the river. The lower dam obstructs the flow of the river so that it is virtually a mill-pond between the dams, and the water is raised upwards of two feet when it sets back to the upper dam, and the proposed building is between these dams. There are numerous buildings and structures along the bank of the river, resting upon piles driven in the bed of the river, among which are certain buildings of the plaintiff, the *Janesville Cotton Mills*, and of other mill-owners, and there is a large sand-bar six feet above the bed of the river, between the cotton-mills and the proposed building. The proposed building will be constructed on piles driven into the bed of the river in line with the piles of said Milwaukee-Street bridge, and the building itself will be above the river. The piles under the said bridge are driven at an angle to the current of the river, and if piles could obstruct the current (which is denied) such a net-work of piles would do so. The defendant acquired his title in fee to the bed of the river where he proposes to build from the riparian owner of the lot, one Thomas Lappin. The defendant pleads, in abatement, that

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several causes of action are improperly united in the same action.

The affidavits in support of the complaint cannot, of course, go further than the complaint in stating the cause of action, and therefore need not be specially referred to. The affiant Edward Ruger made affidavits on behalf of both parties as to the extent to which the waters of the river would be set back below the wheels of the *Janesville Cotton Mills*, and he leaves the question with the qualification that it would be *slight*, and the extent of it he could not state. The learned counsel of the appellant contends that the complaint does not show that the proposed building will injure to any extent either the city of *Janesville* or the *Janesville Cotton Mills*. The condition of the river as to its uses and obstructions, other than by the proposed building, are only material to show that it would be impossible for any one to state the extent, if any, that the proposed building would contribute, by example or otherwise, to produce the consequences, which, if they exist at all, must have already been produced to their fullest extent by other far more adequate causes. How can it be said that the proposed building, standing on piles driven in the river, could, even by example, affect the general health, cause fires and freshets, obstruct the circulation of the air, affect the equality of taxation and assessments, or the general welfare, when, if any such consequences could be appreciably produced by it, they must have already been overwhelmingly produced by a great many far greater obstructions in the river by dams, bridges, buildings, and other constructions. And precisely so as to its injury to the water-power of the *Janesville Cotton Mills*, as to which one of the most competent civil engineers of the state was unable to say to what extent it injured it, if at all, and did state that it must be *slight*. It would seem that if such a comparatively slight cause would produce any effect whatever, such far greater

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obstructions in the river, which have existed for a long time, must have produced all such consequences to a most astounding and alarming extent, and the city must have suffered in its health, and by polluted atmosphere, by unequal taxation, and by fires and floods, to an extent that would have rendered it uninhabitable, and the water-power of the *Janesville Cotton Mills* would have been destroyed. These consequences would have been facts susceptible of proof, and yet the complaint fails to show the existence of any such terrible consequences. What effect, if any, this proposed building by its example may have in any such direction, so as to injure any private or public interest, is left to mere prediction and conjecture. The action does not involve any question of obstruction or injury to navigation, or of injury to any public right. Many of the consequences to the city predicted, would follow as well the erection of said building outside of the river. The complaint does not show that the proposed building would be a private or a public nuisance. The action is based upon the allegations of anticipated injury to the respective plaintiffs, which ought to be prevented by an injunction. It is a private, and not a public, action. I have stated the case more fully, that we may understand what is involved in it and what is not.

In respect to injury to any interest that the city represents, the complaint is very obscure and defective. It is not alleged that the public will suffer by this one building at all, but by a row of buildings which somebody might erect in following the example of the defendant, and so, also, as to danger from fire and flood. That will arise only from "similar buildings, fronting on the bridges, and supported in like manner, and extending up and down the river from the sides of said bridges until the *whole space* over said river on both sides of said bridges is occupied." It is only when such similar buildings erected by others fill that *whole*

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space that it is claimed in the complaint "dangers by fire and flood, and to the public health, and as respects equality in the matter of taxation and the benefits thereof," will even arise or occur. The only injury to these interests that is alleged is from what *somebody else* may do in the future through the influence of the defendant's example, and that is a mere prediction or conjecture. It is not shown how or in what manner such injury could occur. This is a most remarkable case, and there has never been anything like it. It is not charged that the proposed building will in itself do any harm in any respect whatever, or that the defendant has not the right to build it where he proposes to build it, but that it may possibly be followed as an example by others in building buildings which may possibly do harm. It would be a *new case* where one had actually done something in itself right and harmless, and he should be sued because others had done something wrong and injurious by following his example, and it would be a *strange* case to enjoin one from doing something right and harmless in itself, because others may possibly do something wrong and injurious by following his example, and yet the latter is the present case. A mere example is not actionable. Such is the action in favor of the city.

That in favor of the *Janesville Cotton Mills* is not based on any real injury to its water-power. The charge is "that the erection of such proposed building by the said defendant at the place and in the manner aforesaid would cause the water of said river to rise and set back to *some extent at the place* where the water used by the said *Janesville Cotton Mills* to operate its said mill is discharged into the river." It would cause the water to set back *at that place to some extent.* What harm will it do? Will it retard the action of the water wheel? Will it lessen the head or fall of the water-power? If it would do either, it would have been easy to say so. It depends upon how high or low the

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wheels are set. It is not even inferentially stated that it would be any injury at all to the *Janesville Cotton Mills.* How much will it raise or set back the water at that place? "To *some* extent." The very *least* extent possible is *some* extent. The millionth part of an inch is *some* extent. The very smallest extent susceptible of measurement is *some* extent. It seems probable that this expression in the complaint was furnished by Edward Ruger, the civil engineer who made the affidavit in its support and used the same language, and who in another affidavit qualified it by saying, "to what *extent* he could not state, but it would be *slight.*" The word "slight," according to Webster, means "inconsiderable, unimportant." If any injury to the water-power could be inferred from this allegation, it would be too slight for legal cognizance. The complaint states no cause of action against the defendant in favor of the *Janesville Cotton Mills.*

Should a court of chancery enjoin the defendant from erecting his building on his own land, on such an allegation as this? We think the learned counsel of the appellant is right in claiming that the complaint does not charge facts sufficient to state any cause of action known to the general laws of the land and the practice of courts in favor of either plaintiffs. But, even if the complaint sufficiently charged that the consequences predicted would be produced by the proposed building, the city of *Janesville* has no such corporate interest in them as would authorize it to maintain such an action. *Milwaukee v. M. & B. R. Co.* 7 Wis. 85; *Sheboygan v. S. & F. du L. R. Co.* 21 Wis. 667. But it is sufficient that no wrong, injury, or damage is charged. By the extended jurisdiction of the court in equity, by ch. 190, Laws of 1882, amending sec. 3180, R. S., there must be some special injury, or necessity to protect the rights of some person, to grant an injunction. As a private nuisance, or a public nuisance by which some private person has suf-

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fered some special and peculiar injury, there must be *material* annoyance, inconvenience, discomfort, or hurt, and the violation of another's rights in an *essential* degree. Wood, Nuis. 1, 3, 4. The law gives protection only against *substantial injury*, and the injury must be *tangible*, or the comfort, enjoyment, or use must be *materially* impaired. *Stadler v. Grieben*, 61 Wis. 500; *Pennoyer v. Allen*, 56 Wis. 502, and many other cases in this court. It is a maxim of the law that wrong without damage or damage without wrong does not constitute a cause of private action.

It is charged that this building will be in violation of an ordinance of said city. That would not give a cause of action for an injunction, even if the ordinance so provided. *Waupun v. Moore*, 34 Wis. 450.

The argument of the learned counsel of the respondents, and the authorities cited on the question whether the proposed building will obstruct the navigation of the river, are impertinent to the case. There is nothing in the case that involves any such question in the remotest degree. Within any grounds or reasons known to the well-settled principles and practice of equity jurisprudence, the complaint states no case for an injunction, or for any other purpose. The action is not based on any statute which gives a right of action in such a case. But the learned counsel of the respondent cites ch. 423, Laws of 1887, in support of the action. This statute is, if possible, more marvelous than the complaint. The enactment of the statute was obviously obtained to create just such a right of action, and it is a little singular that it is not referred to in the complaint as the foundation of this action, as the action can stand on nothing else, and this statute most clearly sanctions it, excepting as to the city of *Janesville* as plaintiff. The first section is as follows: "It shall be unlawful and *presumptively* injurious and dangerous to persons and property to drive *piles*, build piers, cribs, or other structures, . . .

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in Rock river *within the limits of the county of Rock*, and the doing of any such act *shall be enjoined* at the suit of any *resident tax-payer without proof* that *any injury or danger has been or will be caused* by reason of such act." The italics are not in the act, and are used to save comment. Sec. 2 is specially appropriate to this action, and is as follows: "The doing of any *such act shall also be enjoined* at the suit of any owner or lessee of the right to use water of said river to operate any mill or factory *within said county*, without proof of any further fact than that such act will cause the water of said river to rise or set back, *to some extent*, at the place where the water used to operate such mill or factory is discharged into said river." The complaint copies this last part as the only *grievance* of the plaintiff, the *Janesville Cotton Mills*. The last section is unimportant. It excepts the building of railway and highway bridges, and the repair and reconstruction of mill-dams across the river, and a pending suit of the *Janesville Cotton Mills* and others against *Edwin F. Carpenter*, probably of subject matter the same as or similar to that of this action.

The learned counsel of the appellant contends that this act is unconstitutional and therefore void. The legislature would have saved time and expense if it had issued the injunction in the case for which the act was made. This is the first time that any legislature of any enlightened country ever attempted to create an action without any *cause* of action, to authorize a complaint to be made to a court when there is nothing to complain of; to compel the courts to enjoin the lawful use and enjoyment of one's own property "without proof that any injury or danger has been or will be caused by reason of such act;" to create a cause of action without wrong, injury, or damage; to authorize an action to be brought by a person without any interest in the subject matter, or privity with the defendant of con-

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tract, estate, duty, obligation, or liability, if he is only a resident tax-payer, and to exclude all others who have any interest or privity in the subject matter and are presumptively injured in person or property; to make that act unlawful and actionable in one county and as to one river that is lawful in all other counties and as to all other rivers, under precisely the same circumstances; or to adjudicate and decide the case, and then order and compel the court to execute its judgment by issuing an injunction. These are some of the strange and novel provisions of this statute.

That Thomas Lappin, the owner in fee of this ground, has the right to use and enjoy it to the center of the river in any manner not injurious to others and subject to the public right of navigation, has been too often decided by this court and other courts to be questioned. As a riparian owner of the land adjacent to the water, he owns the bed of the river *usque ad filum aquæ*, subject to the public easement if it be navigable in fact, and with due regard to the rights of other riparian proprietors. He may construct docks, landing places, piers, and wharves out to navigable waters if the river is navigable in fact, and if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor or those having the superior right to use the waters for hydraulic purposes. *Jones v. Pettibone*, 2 Wis. 308; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118; *Walker v. Shepardson*, 4 Wis. 486; *Wis. R. Imp. Co. v. Lyons*, 30 Wis. 61; *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Cohn v. Wausau Boom Co.* 47 Wis. 314; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; *Hazeltine v. Case*, 46 Wis. 391. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the constitution, and it cannot be taken, or its value lessened or im-

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paired, even for public use, "without compensation" or "without due process of law," and it cannot be taken at all for any one's *private* use.

1. This statute makes it unlawful for the defendant who owns this ground and has the right to use it under said Lappin, to drive piles into it anywhere within the river for any purpose. It prevents the lawful use of his property. It takes it away from him without compensation or due process of law, and denies the defendant "the equal protection of the laws." It is therefore in direct violation of articles V and XIV of the amendments of the constitution of the United States, and of section 13 of article I of the state constitution, and is therefore void. It takes his property away from him, and leaves him no remedy whatever by which he can regain it or obtain redress. It is therefore in conflict with section 9 of article I of the state constitution, which "entitles him to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, *property*, or character." Any restriction or interruption of the common and necessary use of property that destroys its value, or strips it of its attributes, or to say that the owner shall not use his property as he pleases, *takes it* in violation of the constitution. *Pumpelly v. Green Bay Co.* 13 Wall. 166; *Wynehamer v. People*, 13 N. Y. 378; *People ex rel. Manhattan S. Inst. v. Otis*, 90 N. Y. 48; *Hutton v. Camden*, 39 N. J. Law, 122.

2. The legislature usurped the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumptively injurious and dangerous, which is not and cannot be made to be so without a violation of the constitutional rights of the defendant, and imperatively commands the court to enjoin it without proof that any injury or danger has been or will be caused by it. It reverses very many decisions of this court on the very questions involved in it, and which have the effect of a judicial deter-

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mination of the defendant's rights of property. It violates section 2 of article VII of the state constitution, which provides that the judicial power of the state, both as to matters of law and equity, shall be vested in the various courts. It takes away the jurisdiction of the courts to inquire into the facts and determine the necessity and propriety of granting or refusing an injunction in such a case, according to the established rules of a court of equity. *Ervine's Appeal*, 16 Pa. St. 256. It is said in that case: "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to *despotic rule* than to any other attribute of government."

3. This statute is discriminating and class legislation, in violation of the spirit of our constitution, and contrary to the principles of civil liberty and natural justice. It gives to a certain class of citizens privileges and advantages which are denied to all others in the state under like circumstances, and subjects one class to losses, damages, suits, or actions from which all others, under like circumstances, are exempted. *Holden v. James*, 11 Mass. 396. Its operation is restricted and partial to that part of Rock river within the county of Rock, while said river elsewhere and all other rivers are excluded. It gives the right of action to the resident tax-payers of said county while all others are excluded from the exercise of such right, whatever interest they may have in the subject matter of the action. It gives the right of action to the owners or lessees of the right to use the water of said river to operate any mill or factory within said county, and excludes all other owners or lessees of such water-powers by means of said river elsewhere. It gives to such favored classes the stupendous advantage and exceptional privilege of maintaining such actions without proof that any injury or danger has been or will be caused

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by reason of such act. It would be difficult, if not impossible, to crowd into so short a statute any more or greater violations of that principle, so essential to a free government, of "equal, general, and standing laws." For these reasons this statute is unconstitutional and void. It is not, perhaps, a violation of any special clause of the constitution in these respects, but it is a violation of its essential spirit, purpose, and intent, and contrary to public justice. *Bull v. Conroe*, 13 Wis. 233; *Durkee v. Janesville*, 28 Wis. 464, and cases cited in the opinion.

In this connection I cannot forbear quoting the language of Mr. Justice CHASE in *Calder v. Bull*, 3 Dall. 387, 388: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. . . . The nature and ends of the legislative power will limit the exercise of it. . . . There are certain vital principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative power,—as to authorize manifest injustice by positive law, or to take away that security of personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." This language is quoted in the above case of *Durkee v. Janesville*, but it will bear repeating here, as more apt and appropriate than in that case.

It has been suggested that this statute was procured for this case and perhaps like cases in the city of *Janesville*, as if, when the courts deny an injunction, the legislature is made to intervene and enact that an injunction *shall* be granted, and that, too, without proof of injury or danger. It is hard to believe that any one would procure the pas-

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sage of such an act or any act of the legislature to circumvent and overrule the courts in cases which have failed for want of any proof of injury. This act is sought to be sustained as a proper exercise of the police power of the state. The act itself makes no such claim, and has not the remotest reference to any such object or purpose. It is sufficient to say that such an objectionable statute cannot be sustained by the exercise of any power inherent in or conferred upon the legislature. The complaint states no cause of action, and therefore the circuit court ought to have sustained the motion to dissolve the injunction.

By the Court.—The order of the circuit court is reversed, and the cause remanded with direction to dissolve the injunction, and for further proceedings.

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CASES DETERMINED

AT THE

August Term, 1890.

SCOTT, Executor, Appellant, vs. NEEVES and another, imp., Respondents.

April 14 — September 23, 1890.

WILLS. *(1) Construction: "Indebtedness." (2) Parol evidence to explain. (3) Payment of attorneys' fees out of estate.*

1. A will provided that "whereas my brother G. . . . is now indebted individually to the estate of my husband, S., deceased, I direct that such individual indebtedness be paid for him out of my estate (so that he may be wholly released from the same) so far as any such indebtedness remains outstanding at my decease." G., while doing business for his brother W., had borrowed money from the husband of the testatrix, giving notes therefor signed in the name of W. by G. as agent, and a portion of said notes remained unpaid. The testatrix had been accustomed to speak of the indebtedness upon said notes as the indebtedness of G., and it was that indebtedness to which she referred in her will. *Held* that, although G. was not legally liable to pay such indebtedness, it was the intention of the testatrix that it should be paid out of her estate. TAYLOR, J., dissents.
2. Parol evidence that the testatrix always regarded and spoke of such indebtedness as the indebtedness of G., was admissible to show that it was the indebtedness referred to in the will.
3. In the action by the executor for a construction of the will in such case, the circuit court properly directed that the taxable costs and disbursements of all parties be paid out of the estate, and that the county court make such allowance to the respective parties out of the estate for counsel fees as might be just.

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APPEAL from the Circuit Court for *Columbia* County.

Action by the executor of the last will and testament of Ann E. Scott, deceased, to obtain a construction of certain provisions therein. The action was commenced in the circuit court for Lincoln county, but upon the application of the defendants *William B. Neeves* and *George A. Neeves*, on the ground of prejudice of the judge, the place of trial was changed to Columbia county. The facts will sufficiently appear from the opinion of the court by the Chief Justice and the dissenting opinion of Mr. Justice Taylor. The executor appeals from so much of the judgment of the circuit court as construes the latter clause of the third paragraph of the will, and so much thereof as provides that the county court of Lincoln county make an allowance to the respective parties out of the estate for counsel fees.

For the appellant there was a brief by *Curtis & Curtis*, attorneys, and *George R. Gardner*, of counsel, and oral argument by *H. H. Curtis* and *Mr. Gardner*.

For the respondents there was a brief by *Stark & Sutherland*, and oral argument by *Joshua Stark*.

The following opinions were filed April 29, 1890:

COLE, C. J. There does not appear to be any dissatisfaction with the construction which the learned circuit court placed upon the 12th, 14th, 15th, and 19th paragraphs of the will of Mrs. Scott. The executor accepts that construction as correct, and as a full and complete interpretation of the meaning of those paragraphs, and has taken no appeal from those portions of the judgment. So we are relieved from all consideration of these paragraphs of the will, and they may be passed without further comment.

The controversy in this court is mainly over the meaning of the third paragraph, which reads as follows: "Whereas my brother *George A. Neeves* is indebted to me in the sum of ten thousand dollars, money loaned, it is my will that

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the said indebtedness be canceled and my brother released from all demands and obligations in consequence of the same; and whereas he is now also indebted individually to the estate of my husband, Thomas B. Scott, deceased, I direct that such individual indebtedness be paid for him out of my estate (so that he may be wholly released from the same) so far as any such indebtedness remains outstanding at my decease."

The question now is, What should be understood by the language used in the last clause of this paragraph? In the answer of the defendants *W. B.* and *George A. Neeves*, they insist that the intention of the testatrix was to provide for the payment of certain sums of money loaned to said *George A.* by Mr. Thomas B. Scott in his life-time, and for which the said Scott received notes made and signed by said *George A.* in the name of the defendant *William B.*, his brother, as agent of said *William*, and that this was the indebtedness which the testatrix had in mind and desired should be paid out of her estate to the estate of her husband. The facts in regard to the origin and history of this indebtedness, as found by the circuit court, are as follows:

"For three or four years prior to December 11, 1883, and on that date, the defendant *George A. Neeves* was insolvent, and was doing business for his brother, *William B. Neeves*, as his agent, which facts were known to Thomas B. Scott and to the testatrix, Ann E. Scott. On the 11th day of December, 1883, Thomas B. Scott, the husband of the testatrix, Ann E. Scott, loaned to her brother, the said *George A. Neeves*, at her solicitation and request, the sum of $4,000, and received of him as security for such loan four certain promissory notes for $1,000 each, bearing date December 11, 1883, and made and signed by said *George A. Neeves* in the name of the defendant *William B. Neeves* by the said *George A. Neeves* as agent. There was no understanding or agreement between the parties to said loan,

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when said notes were given to secure the same, that they were given, or were to be received, in payment for the money loaned. That said Thomas B. Scott afterwards spoke of and referred to said loan as a loan to said *George A. Neeves*, and always understood, prior to and at the time of his death, that the said *George A. Neeves* was to look after and pay said notes still outstanding, and relied upon him so to do. The money so loaned was used by said *George A. Neeves* in the business of the Grand Rapids Flouring Mill Company, a corporation of whose business he was manager. Two of said promissory notes given to secure the loan of $4,000 were paid by said flouring mill company to said Thomas B. Scott prior to his death, and the remaining two notes were still outstanding and unpaid in the hands of the executors of said Thomas B. Scott, to the knowledge of said Ann E. Scott, when her will was made; said unpaid notes being payable, respectively, eight and nine months after their date, with interest at eight per cent. per annum; and said notes are still outstanding and unpaid, and are in the possession of *Walter A. Scott* as trustee of the estate of Thomas B. Scott, deceased. The testatrix, Ann E. Scott, while she lived and at the time she made her will, understood the said indebtedness to Thomas B. Scott for said loan, to secure which said promissory notes were so given in the name of *William B. Neeves*, to be the indebtedness of her brother *George A. Neeves* to her husband, Thomas B. Scott, in his life-time, and to his estate after his death; and she often and uniformly spoke of said indebtedness as the indebtedness of said *George A. Neeves*, and expressed in her life-time, after the death of her husband, the said Thomas B. Scott, a desire that the payment of said indebtedness should not be enforced by the executors of her said husband's will. The said *George A. Neeves* was not, at the date of the decease of said testatrix, Ann E. Scott, and had not been for many years prior to that date,

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indebted to said Thomas B. Scott or his estate in any manner or for any amount, either individually or otherwise, except for the balance of said $4,000 loaned and secured by said notes made in the name of *William B. Neeves;* and the said testatrix, at the same time she made her will, so understood, and had no knowledge of any other outstanding indebtedness of said *George A. Neeves* to the estate of her said husband, and had no other indebtedness in mind. The testatrix, Ann E. Scott, meant and intended by the individual indebtedness of her brother *George A. Neeves* to the estate of her husband, Thomas B. Scott, referred to in the third paragraph of her last will and testament, the indebtedness to the estate of her said husband for the balance unpaid on said loan of $4,000, to secure which said promissory notes had been so given by said *George A. Neeves* in the name of *William B. Neeves*, which indebtedness she understood to be, and was accustomed always to describe and speak of as, the individual indebtedness of said *George A. Neeves*, and she intended to and did, in and by said paragraph, direct that such indebtedness secured by said notes, so far as the same might remain outstanding at her decease, should be paid out of her estate."

That there is much evidence in this case which sustains these findings, it seems to me, cannot well be denied. Even if they are not supported by the weight of testimony, there is no such clear preponderance of proof against them as will warrant this court in setting them aside. The argument of plaintiff's counsel, in his contention of the proper meaning of the third paragraph, proceeds largely on the assumption that the testatrix must have had in mind a legal indebtedness of *George A. Neeves* to the estate of Thomas B. Scott,— one which could be enforced by the estate in an action; and, unless such indebtedness in fact existed when the testatrix died, there is nothing to which the language applies. But this is not the correct view in which to con-

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sider the matter. If possible, we must ascertain the intention of the testatrix, and carry that intention into effect. Extrinsic exidence of the facts and circumstances which will explain the language and show in what sense it was used by the testatrix, is admissible, though, of course, not to change the plain meaning of the words. The words "debt" and "indebtedness" are not always used in the same sense; that is, they do not always import a legal obligation on the part of one to pay another something due him. They often imply a mere moral or equitable obligation, as well as a strictly legal one. In what sense were the words "individual indebtedness" used in this paragraph? Must we assume that the testatrix referred to a strictly legal debt which *George A. Neeves* owed the estate of her husband, and to no other? Or had she in mind an indebtedness which she supposed *George A. Neeves* was legally or morally bound to answer for to the estate of Thomas B. Scott? In the interpretation of the language, it will not do to stop with the inquiry, Did *George A.*, in fact and in law, owe a debt to the estate of Thomas B. Scott which could be enforced by action in favor of the estate when the testatrix died? It is an established fact that *George A. Neeves*, as agent, gave the notes of his brother *William B. Neeves* for the loan when it was made. But whether *George A.* borrowed the money for himself or for his brother or to be used in the flouring mill business, is a question we do not deem it necessary to determine. Certain it is that loan was obtained by him. It is equally certain that Mrs. Scott knew about this loan made by her husband to *George;* and there is good ground for the inference that the loan was made at her request, and that, when she executed her will, she knew that a part of the loan was unpaid. The evidence is clear and satisfactory that she regarded and spoke of this debt as the indebtedness of her brother *George A.* It is not probable that she had any ac-

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curate knowledge as to whether he was technically liable at law for the loan, but that she spoke of this debt as the debt of *George* is indisputable. To sustain this statement, it is only necessary to refer to her letter written to *George*, dated March 8, 1887, in which she tells him that a note against him for $3,500 had been found among her husband's papers, and asking him "*if he was owing the estate anything besides that $2,000 and interest.*" The $2,000 was the unpaid balance of the $4,000 loan; and the $3,500 note referred to was the Bull note mentioned in the case, which was no longer an existing indebtedness against any one. There is much testimony besides this item which shows that, in conversations, Mrs. Scott referred to this indebtedness for the balance of the loan to her brother *George* as his indebtedness; and there can be no doubt, upon the evidence, that this was the indebtedness which she had in mind when she made her will. It is suggested that she referred to the Bull note, but this supposition is completely overthrown by the testimony. She must have had in mind this indebtedness of *George* to her husband's estate for this loan, which she supposed he was liable for or morally bound to make good; and the learned circuit judge was fully warranted in finding, upon the evidence, that she was accustomed to speak of that indebtedness, and always described it, as the indebtedness of *George* to the estate of her husband. We shall not attempt to refer to the testimony which sustains that view, for it is unnecessary.

But the question remains, Was it competent to show by extrinsic evidence that the testatrix always regarded and spoke of this indebtedness for the balance of the loan as the indebtedness of her brother *George A.* to her husband's estate, so as to identify the subject matter to which she referred in her will when she directed that such individual indebtedness be paid for him out of her estate? We have already indicated our view that she did not necessarily nor

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probably refer to a technical legal liability of *George* to the estate of her husband, but that an equitable or moral obligation on his part to answer for that debt would come within the meaning of the language. But was parol evidence admissible to show that the testatrix used the language in that sense? It seems to us that evidence of the facts and circumstances which tend to disclose the intention of the testatrix, and enable us to understand the meaning and application of her words, was admissible. We think the rule laid down by Prof. Greenleaf sanctions the admission of such evidence to apply the intention of the testatrix and explain what was the indebtedness to which she referred. 1 Greenl. Ev. §§ 277, 289. The effect of the evidence was not to add words to the will, nor contradict the words used therein, but to explain what was really intended by words of doubtful meaning. It comes within the rule laid down by Mr. Justice LYON in *Morgan v. Burrows*, 45 Wis. 217, where evidence is held admissible in aid of the interpretation of words of uncertain or doubtful meaning. See, also, *Miller v. Travers*, 8 Bing. 244; *Cloak v. Hammond*, L. R. 34 Ch. Div. 255; *In re Bushell*, L. R. 13 Prob. Div. 7; *Atkinson's Lessee v. Cummins*, 9 How. 479. Judge Redfield states the rule in substantially these words: "The admission of parol evidence in regard to wills is essentially the same as that which prevails in regard to contracts generally. It can be received to show the intention of the testator, and especially to enable the court, where the question arises, to give his language such an interpretation as it is reasonable to presume, from the circumstances in which he was placed, he intended it should receive, or to put the court in the place of the testator." 1 Redf. Wills, 496. Hence we think there was no error in admitting parol evidence of extrinsic circumstances to show in what sense the testatrix used the word "indebtedness" in the third paragraph of the will. It is apparent that she did not neces-

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sarily use it in the strict sense of a legal liability on the part of *George A. Neeves* to the estate of Thomas B. Scott, but might, and probably did, attach a different meaning to it. Of course the intention of the testatrix must have effect given to it.

The other error assigned is the direction in the decision and judgment of the court below as to the payment of costs and disbursements. The court directed that the taxable costs and disbursements of all parties who had appeared in that court should be paid out of the estate of Ann E. Scott, deceased, and that the county court of Lincoln county should make such allowance to the respective parties out of the estate for counsel fees as, in the exercise of sound discretion, might be just. This order conforms to the direction of this court in *Scott v. West*, 63 Wis. 588; *Webster v. Morris*, 66 Wis. 400; *Ford v. Ford*, 70 Wis. 68—which decisions upon this point we have no desire to disturb.

It follows from these views that the part of the judgment of the circuit court appealed from is affirmed; taxable costs and disbursements of both parties in this court to be paid out of the estate of Ann E. Scott.

By the Court.—Ordered accordingly.

LYON, J., took no part.

TAYLOR, J. This action was commenced in the circuit court by the appellant executor for the purpose of obtaining a construction of certain portions of the will of the testatrix, Ann E. Scott. *William B. Neeves* and *George A. Neeves* were made parties to the action as being interested in said will as legatees named therein. In the complaint the executor asked for the construction of certain clauses and provisions in said will, but did not ask for any construction of the third clause in said will, which reads as

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follows: "*Third.* Whereas my brother *George A. Neeves* is indebted to me in the sum of ten thousand dollars, money loaned, it is my will that the said indebtedness be canceled, and my brother released from all demands and obligations in consequence of the same. *And whereas he is now indebted individually to the estate of my husband, Thomas B. Scott, deceased, I direct that such individual indebtedness be paid for him out of my estate (so that he may be wholly released from the same) so far as any such indebtedness remains outstanding at my decease.*"

The contention on this appeal is as to the construction which should be given to the words in italics in this paragraph of the will. In other parts of the will the testatrix gave her brother *William B. Neeves* a legacy of $25,000, and to her brother *George A. Neeves* $25,000 in trust for his children.

The brothers of the deceased, *William B.* and *George A.*, appeared in the action and claimed that the court should construe this clause of the will, as well as the parts asked to be construed by the plaintiff in the action; and they offerred evidence tending to show, as they claim, that the clause above quoted in italics was intended by the testatrix to refer to a particular claim or debt due to the estate of Thomas B. Scott, her deceased husband, upon a loan of $4,000 made by said Scott in his life-time, as is claimed, to *George A. Neeves*, and $2,000 of which remained unpaid at the time of the death of the testatrix, and that she intended that her estate should pay and cancel this debt, irrespective of the question whether her brother *George* was indebted to the estate of Thomas B. Scott for any part of such $2,000 at the time of her death, or not. The answer of the respondents upon this part of the will is as follows:

"These defendants further allege that, by the individual indebtedness of the defendant *George A. Neeves* to the estate of Thomas B. Scott, deceased, which by the third

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paragraph of said will the said testatrix, Ann Eliza Scott, directed to be paid for him, said *George A. Neeves*, out of her estate, so that he might be wholly released from the same, so far as any such indebtedness should remain outstanding at her decease, the said testatrix referred to, and intended to provide for the payment of, certain sums of money loaned to the said *George A. Neeves* by said Thomas B. Scott in his life-time, and for which said Thomas B. Scott received a note or notes made and signed by said *George A. Neeves* in the name of the defendant *William B. Neeves*, his brother, by him, said *George A. Neeves*, as agent; that, at the time of the decease of said Thomas B. Scott, *George A. Neeves* was not indebted to him except for the moneys represented by said notes, and that the said Ann Eliza Scott knew of the loaning of said moneys by said Thomas B. Scott to said *George A. Neeves*, and supposed at the time she executed said will that the evidence of indebtedness for such loans or loan held by said Thomas B. Scott in form and fact showed the said *George A. Neeves* to be the debtor of said Thomas B. Scott therefor, and it was her intention by said paragraph 3 of said will to cause such indebtedness represented by such note or notes to be paid and wholly satisfied out of her estate. These defendants *William B. Neeves* and *George A. Neeves* further allege that the said *Walter A. Scott*, plaintiff, has declared that it is his purpose to enforce the collection of said indebtedness by action upon said notes against said *William B. Neeves*, or otherwise, notwithstanding said provision in said paragraph 3 of said will of Ann E. Scott, deceased; and these defendants fear that he will commence and prosecute such action, unless he should be restrained from so doing by order of this court. Wherefore these defendants pray that it may be adjudged and determined by the court that it was the intention of said Ann E. Scott, in and by said third paragraph of her will, to provide for the payment of said notes,

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and of the indebtedness represented thereby, by the plaintiff, as executor of her said will, out of her estate, and that said third paragraph of her said will be, by the judgment of this court, construed as referring and applying to said indebtedness and said notes given therefor, and that the said plaintiff be enjoined by the final judgment in this action, and also during the pendency thereof, from selling, transferring, or in any manner disposing of said notes, or commencing or prosecuting any action thereon against said *William B. Neeves* or said *George A. Neeves*, or otherwise attempting to collect the same."

On the trial in the circuit court the respondents were permitted to introduce evidence, under objection by plaintiff, which, it is claimed, tends to show that the testatrix, by this clause in her will, intended to cancel any debt due to the estate of her deceased husband on account of said $4,000 loan, irrespective of the question as to who owed the debt; and it is insisted that it makes no difference as to the construction of this clause of the will whether *George A.* was at the time of her death, or at any other time, indebted to Thomas B. Scott or to his estate for said sum so loaned, or any part thereof. After hearing the evidence in the case, the learned circuit judge made findings upon this question numbered 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32. The thirty-second finding of fact reads as follows: "The testatrix, Ann E. Scott, meant and intended by the individual indebtedness of her brother *George A. Neeves* to the estate of her husband, Thomas B. Scott, referred to in the third paragraph of her last will and testament, the indebtedness to the estate of her said husband for the balance unpaid of said loan of $4,000, to secure which said promissory notes had been so given by said *George A. Neeves* in the name of *William B. Neeves*, which indebtedness she understood to be, and was accustomed always to describe and speak of as, the individual indebtedness of said *George A. Neeves;* and

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she intended to and did, in and by said paragraph, direct that such indebtedness secured by said notes, so far as the same might remain outstanding at her decease, should be paid out of her estate."

And the court found, as a conclusion of law, as follows: "It should be declared and adjudged by the judgment of the court herein that in and by the latter clause of the third paragraph of her will, construed and interpreted according to the true intent and meaning thereof, *first* the said testatrix, Ann E. Scott, directed the payment by her executor, out of her estate, to the estate of her deceased husband, Thomas B. Scott, of the said sum of $2,000, being the unpaid balance of principal of the $4,000 loaned by said Thomas B. Scott to *George A. Neeves* December 11, 1883, and secured by two notes of *William B. Neeves* of that date, made by *George A. Neeves* in his name and as his agent, for $1,000 each, due respectively eight and nine months after date, and bearing interest at the rate of eight per cent. per annum, together with interest upon said $2,000 at the rate of eight per cent. per annum from December 11, 1883, according to the terms of said notes."

The plaintiff duly excepted to the findings of fact and conclusions of law.

It is not contended by the learned counsel for the appellant that the judgment would not be right if there was sufficient evidence in the case to show that *George A. Neeves* was indebted to the estate of Thomas B. Scott, directly or indirectly, for this $2,000, at the time of the death of the testatrix; but it is insisted that the whole evidence in the case shows conclusively that *George A. Neeves* was not at the time of her death, or at any other time, indebted to Scott on account of said loan, and that Scott or his executor has never made any claim on *George A.* on account of such loan. I agree with the contention of the learned counsel for the appellant on this point. My reason for

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agreeing with their contention is based on the fact that *George A.* never received any benefit from said loan, so far the evidence in this case tends to show, and that *William B. Neeves* received all such benefit, and his notes were given to and accepted by Scott as the evidence of the indebtedness at the time the loan was made, and further rely upon the written statement of *George A.*, made within eight months of the death of the testatrix, that he owed the estate of Thomas B. Scott nothing.

I do not understand that even the learned counsel for the respondents place great reliance on the fact of the actual indebtedness of *George A. Neeves* to the estate of Thomas B. Scott at the time of the death of the testatrix to sustain the judgment entered in the case. Their principal reliance is upon the claim made that the testatrix intended by her will to direct her estate to pay the amount due the Scott estate on said $4,000 loan at the time of her death without any regard as to who was the debtor. In my opinion, the evidence in this case fails entirely to show any such intent on the part of the testatrix, admitting that it was competent under the law to show by parol evidence that such was her intention. It seems to me very plain that the testatrix, by this statement in her will, intended to benefit her brother *George*, and no one else. It is urged that she supposed that *George* was indebted to her deceased husband upon two notes of $1,000 each, and that it was these notes she intended to have paid out of her estate. This contention, it appears to me, is not probable, nor is it sustained by the evidence. There is evidence enough to show that she knew of the existence of these notes, and there is also an abundance of evidence that she knew that these notes were not signed by her brother *George*, but were signed by her brother *William B.* Now, it is almost too clear for doubt that, if the testatrix had intended to provide for the payment of these notes without regard to the fact whether her

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brother *George* was liable for their payment, she would, most naturally, have so stated in her will, and have directed their payment; but, if she intended that they should be paid out of her estate only in case *George* was liable for their payment, she would have directed just as she did in her will. The language of the will, to my mind, excludes the idea that she intended to pay these two notes in any event, whether *George* was liable for their payment or not. Had the evidence shown that the testatrix did not know that *William B.* had given his notes for the $2,000, there would be some reason, perhaps, for saying that she intended to pay this debt in any event; but, when she knew of the liability of her brother *William B.* to pay this debt, and still provides only for the payment of the debt of *George*, it seems to me she excludes the idea that that particular debt shall be paid whether *George* be liable to pay it or not.

It is urged that she supposed *George* was liable to pay this debt, and so it ought to be paid out of her estate. The fact that she supposed *George* liable for the debt can make no difference. Suppose *George* had given his notes for this debt, but, before his sister made her will, he had some arrangement between himself and some stranger by which, for a valid consideration, he had been released from the debt and such stranger had become liable to pay the same to the estate of her husband. Can it be possible that such stranger could have insisted that the debt should be discharged out of her estate, under the language of this will? Who will be benefited by the payment of this debt out of the estate of the testatrix? Certainly no one else than *William B.;* and, when the debt of *William B.* is discharged by the estate of his sister, he will be under no legal or moral obligation to pay the amount to *George;* and so a provision in her will clearly intended to benefit her brother *George* is by the judgment of the court made to

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benefit *William B.*, without one word in her will or any intention shown in the evidence that she intended to benefit her brother *William.*

The only reason that could be urged with any plausibility that the testatrix intended that this $2,000 should be paid irrespective of the question as to who was the debtor, must rest on the idea that she supposed that the money which was loaned went into the mill business, and so benefited *George*, and whatever relieved the mill business would benefit him. But the evidence of *George* and *William B.* both rejects this theory of the case. *George* claims no interest in the mill business except to the extent of $25, and *William B.* in no way recognizes his interest in that business beyond his ownership of one share of the stock, of the par value of $25. Why, then, should the mill-owners be relieved from the payment of the $2,000 which they have received and used in their business, by a clause in this will which is clearly intended to benefit *George*, and *George* only? If this $2,000 be paid out of the estate of the testatrix, so far as the evidence in this case shows, no one will be benefited except the owners of the stock of the mill company, some of whom are entire strangers to the testatrix and in no way the objects of her bounty. If, after this debt of the mill company was paid out of her estate, there would be a legal claim on the part of *George* to demand the money of the mill company, the case would have a different aspect, and it might be claimed that the intention of the testatrix would be accomplished substantially as she intended. If it could be shown from the evidence in this case that the payment of the $2,000 out of the estate of the testatrix would inure to the benefit, in any way, of *George A. Neeves*, I should not feel that the intention of the testatrix had been defeated, although in that event it would be taking the $2,000 out of the estate of testatrix,

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and giving it as an absolute legacy to *George*, and not simply the canceling of a debt due from *George* to the estate of Scott.

It is said that the testatrix might recognize *George* as the debtor to the estate of Scott for the $2,000, whether there was any legal liability on his part or not; but then, to carry out her intention to benefit *George* to the extent of such indebtedness, the court ought to declare the Scott estate a trustee of the $2,000 when collected of *William B.* for the benefit of *George*, and the estate directed to pay *George* the $2,000 when collected. Such a decree would carry out her intent to benefit *George*, and not the mill company, which can alone be benefited under the judgment entered in this case.

The evidence in the case shows that if, even at any time, *George* was indebted to the estate of Scott for this loan, such indebtedness was for a valuable consideration assumed by his brother *William B.* or by the mill company. The consideration for such assumption of the debt was the receipt by the mill company from *George* of the whole amount of the money loaned, and the giving of the note of one of the principal stock-owners for the payment of such loan, which note was accepted by Scott in full satisfaction of such debt by *George*. Suppose *George* had in fact given his own note to Scott for this $2,000, and this fact had been known to the testatrix, but before her death, and without her knowledge, *George* had paid the $2,000 note to Scott by giving Scott the note of his brother *William*, *William* having received from *George* a sufficient consideration for his note for $2,000. Is it possible that *William* could have received the benefit of this provision in the will of the testatrix? And yet this is substantially what the evidence in the case shows. *George* owes nothing to Scott, because he has in fact received nothing from him. *William* does owe Scott the $2,000, and has received a full consideration for

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his promise to pay the debt. Now, if his debt is paid out of the estate of the testatrix, he, and he alone, is the beneficiary under the will, instead of *George;* and, contrary to the express terms of the will declaring the provision for the benefit of *George*, the entire benefit goes to *William B.*, with no liability over to *George* after his debt is satisfied and discharged. The fact that the testatrix supposed *George A.* owed this debt is the strongest evidence that she did not intend that her estate should pay it unless he did in fact owe the debt. If she had intended this debt should be paid irrespective of who owed the debt, it is to me very certain she would not have used the language she did use in her will.

It seems to me so clear that the judgment of the circuit court is in conflict with the intention of the testatrix expressed in her will, that I am constrained to dissent from the decision of this court sustaining such judgment.

A motion for a rehearing was denied September 23, 1890.

CRIBB, Appellant, vs. MORSE and others, Garnishees, Respondents.

May 23 — September 23, 1890.

Debtor and creditor: Partnership: Insolvency: Mortgage to secure individual debt.

A bank loaned money to one member of a firm and, to secure payment thereof and of certain moneys previously owing by the firm, took a note signed by the partners individually and a mortgage of firm property signed in the same way. The bank knew at the time that the firm was insolvent and that the money then loaned was to pay the individual debt of the partner to whom it was loaned. *Held*, that to the extent of the money so loaned the mortgage was void as against other creditors of the firm.

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APPEAL from the Circuit Court for *Sauk* County.

Garnishment. The facts are sufficiently stated in the opinion.

S. U. Pinney and *A. L. Sanborn*, for the appellant.

G. Stevens, for the respondents.

The following opinion was filed June 21, 1890:

ORTON, J. The firm of J. & P. Hagenah, consisting of John H. and Peter Hagenah, dealers in hardware and agricultural machinery at Reedsburg, Wisconsin, were indebted to the appellant, and he commenced an action thereon and caused *George T. Morse*, *Winchester* and *Keith*, proprietors of the private bank called "The Citizens Bank," of that place, to be summoned as garnishees. On the trial of the issue between the appellant and said garnishees, the following facts appeared in evidence:

In June, 1874, the said Hagenahs formed a partnership with one Henry Geffert in said business, which continued until January, 1883, at which time the present partnership was formed. In 1878 John H. Hagenah became guardian of certain minor children, and held for them, as such guardian, the sum of $5,000. After that time said firm, besides the above business, were interested in the brewery business, and were engaged in buying wheat, and one Smith was interested with them in the wheat business, and one Henry Dierke was interested with them in the brewery business. The said John H. Hagenah testified, as a witness, that all of said $5,000 went into the business of said firm as it was needed from time to time, but he could not tell at what times or in what sums, and that some of it was used in buying wheat, and some of it in the brewery business, and some in the hardware business, but in what amounts he could not tell, and he kept no account of it whatever, and he could not tell what part of the money was paid for one thing and what part for another. There was no accounting or settle-

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ment of this money between him and the firm, and it does not appear that the other partners of the firm knew anything about it, or that there was any account of it on the books of the firm, and there had never been any acknowledgment or recognition of it by the partnership in any way whatever. All the minor children, except one, had become of age, and had been paid their shares of said fund by the said John H. Hagenah, their said guardian, but to pay the last one he was compelled to obtain some money from said bank, through and by the aid of friends, in the year 1888.

About the 15th day of June, 1889, the last heir interested in said fund either had become, or was about to become, of age, and it became necessary for the said John H. to obtain the money to pay her share. As merchants they had become grossly insolvent, and the firm had made many loans of the bank from time to time, secured by collaterals, but had not paid anything directly upon them, and the bank had received nothing upon them, except through the collaterals, until May 22, 1889, when the firm placed all such loans yet unpaid in the form of a $5,000 collateral note, due one day after date, signed by J. & P. Hagenah. On said June 15th the said John H. called upon the said *Morse*, the president of the bank, and told him that the last heir had to be paid, and he must raise the money somewhere. He testified that he presumed *Morse* knew about his having used up the money that belonged to the heirs, and what this was for, because he had got some money of the bank for such purpose before. The amount he required for such purpose was $2,200; and it was arranged that $800 of the above collateral note and $500 due a creditor of the firm, in the hands of the bank for collection, should be placed with the said $2,200, making in all $3,500, in the form of a note payable to the bank on demand, signed first by John Hagenah and then by Peter Hagenah. The note was se-

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cured by a mortgage on the goods of the firm, signed in the same way. It was John H. Hagenah alone who borrowed the money; and his partner, Peter Hagenah, had nothing to do with obtaining it, except by his signature to said note and mortgage.

The firm kept on selling from the stock, and the mortgage had not been filed, and it became apparent that the corporation of Hibbard, Spencer, Bartlett & Co., of Chicago, to whom the firm was indebted in the sum of about $9,000, was about to take steps to obtain payment. Then on July 8, 1889, a new note and mortgage, precisely like the first one, and signed in the same way, and in place thereof, were given to said bank, and said bank took immediate possession of all of said stock by virtue of said mortgage. The assets of said firm were only about $14,000, and their indebtedness was over $20,000; and it is evident that the proprietors of said bank knew that said firm was insolvent, although they may not have known the extent thereof. Very soon after the bank took possession of said stock, the above corporation of Hibbard, Spencer, Bartlett & Co. took a second mortgage thereon, as also an assignment of all the accounts of said firm, which constituted all of the property of said firm, as security for their said claim. Said corporation was also summoned as garnishee by the appellant, and the issue in that case was tried at the same time. [See *Cribb v. Hibbard, Spencer, Bartlett & Co.*, *ante*, p. 199.] But this case is confined to that of the appellant against the bank. Pending the proceedings, by stipulation of the parties the said stock was sold for $3,900, which was paid into court to await the result.

The learned circuit judge directed the jury to find that the said chattel mortgage so given by John and Peter Hagenah to the Citizens' Bank was and is a valid security, and that the said proprietors of said bank are entitled to hold the proceeds of said goods to the extent of said note.

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The appellant having excepted to this direction and finding, and having appealed from the judgment, his learned counsel claim, and we think correctly, that said mortgage to the extent of that $2,200 borrowed of the bank by said John H. Hagenah to pay his individual debt to said heir, and for which he was liable on his bond as her guardian, was and is void. Peter Hagenah was not interested in said loan, and was therefore a mere surety on said note for John Hagenah as principal. It seems to be clear that the proprietors of the bank knew that the firm of J. & P. Hagenah was insolvent. They had so much to do with their affairs that they must have known that they were unable to pay their debts, and had been for a long time. They knew, also, that John H. Hagenah borrowed that sum of $2,200 of them to pay his debt to one of the heirs for whom he was guardian, and that it was his individual debt. There is no evidence that the proprietors of the bank knew that the said John H. ever claimed that he had used the moneys of said heirs in the business of the old firm of Hagenahs & Geffert, or that the present firm owed him anything on account of it. This claim that the present firm was or is indebted to John H. on account of the money of said heirs having been so used in the business of the old firm is recent, and is first made on the trial of this issue. It is at best a very suspicious and uncertain one. At least three persons interested in the business of said firm were also interested in the use of said money; and when they retired from the firm it is to be presumed that they accounted for their share of it, if any such claim existed. The said John H. is unable to give any intelligible account of it. If he is unable to recollect when or how it was used, he would probably not recollect if he had long since received it back from the old firm. His want of recollection of anything about it may arise from the fact that it was long since settled up and disposed of. But it is sufficient that there has never been

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any recognition or acknowledgment of it by the old or the present firm. The said John H. did not tell *Morse* that the firm wished to borrow this $2,200 to pay him for the heir's money which he had used in the business of the old firm. Nothing of the kind was intimated, and no such claim was then made, and the proprietors of the bank knew nothing of any such claim or of any such fact. They knew only that John H. borrowed the money to pay his own individual debt to one of the heirs, and they loaned it to him for that purpose, and for no other, on the promise of security on the property of the firm. They loaned him money the year before, on the security of others, to pay another of the heirs.

The note is an individual one, and is *prima facie* evidence of an individual indebtedness. Bates, Partn. § 452; *In re Roddin*, 6 Biss. 377; *Hilliker v. Francisco*, 65 Mo. 598; *Freeman v. Campbell*, 55 Cal. 197; *Buffum v. Seaver*, 16 N. H. 160. It is conceded by the learned counsel of the respondent that the mere fact that one partner puts money into the concern for which he is individually liable does not make it a firm debt. It follows, therefore, that there was no evidence to show that the note was, or was intended to be, a partnership obligation, or anything different from what the individual signatures import it to be. The old $5,000 note to the bank was signed by the name of the firm. Why was this note not signed the same way, if it was not because the parties all knew that the $2,200 of it was to pay the individual debt of John H. Hagenah? It might be that if the firm had at any time given the firm note for this money to the heir, or to the bank to raise money to pay the heir, for the consideration that it had been used in the business of the firm, such note might be good, excepting as to existing creditors; but that is the fullest extent to which the doctrine can be carried. Here, no such note was ever given by the firm, and there is no

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evidence that either Peter Hagenah or the firm had ever recognized or acknowledged, in any way, this to be a firm debt. The case is very different from *Haben v. Harshaw*, 49 Wis. 379. It cannot be claimed that this note so signed is any such acknowledgement, for it is *prima facie* evidence of individual liability. The mortgage given was void, because the firm, being insolvent, attempted by this means to appropriate the partnership property to the payment of the individual debt of one of the partners.

All the material questions in this case were involved in the case of *Willis v. Bremner*, 60 Wis. 622. In that case the partnership of Brearly & Adams consisted of Brearly and H. K. Adams, and they sought to obtain a loan of $1,000 from the bank. H. K. Adams gave his notes to one D. H. Adams, and he indorsed them to the bank, which discounted them and placed the money to the credit of the firm on the bank books. The firm, being insolvent, made an assignment and preferred these notes when it was lawful to make preferences. The sheriff took the goods assigned, on attachments in favor of creditors, and the assignee brought the suit against the sheriff for the conversion of the property. The court below held the assignment valid, but this court reversed the judgment, and held the assignment void, because it preferred the individual debt of one of the partners. There was nothing in the assignment that showed anything but the notes given in this form, but the court below allowed proof of all the facts stated. The bank knew nothing about the notes except in the form in which they were given. That case is much stronger in favor of the doctrine contended for by the learned counsel of the respondents than this case, in the facts proved. Here, the bank knew nothing about any transaction to make the $2,200 a partnership matter, except the note and mortgage signed by the individual partners, which imported the individual indebtedness of John H. Hagenah as principal; but, on the

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other hand, the bank did know that the $2,200 part of the note was to pay the heir what John H. Hagenah owed her, and that he borrowed it for that purpose. The above case is conclusive against the claim of the mortgagee; but see, also, *Menagh v. Whitwell*, 52 N. Y. 146; *Goodbar v. Cary*, 16 Fed. Rep. 316; *Ferson v. Monroe*, 21 N. H. 462; *Cron v. Cron's Estate*, 56 Mich. 8; *Scott v. Dansby*, 12 Ala. 714; Bates, Partn. § 566.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with direction to hold the mortgage of the garnishees void as to the sum of $2,200 loaned to pay the individual indebtedness of John H. Hagenah, and valid only as to the residue, and to render judgment accordingly.

A motion for a rehearing was denied September 23, 1890.

STUCKEY, Respondent, vs. FRITSCHE, Appellant.

May 26 — September 23, 1890.

PARTNERSHIP: PLEADING: PRACTICE. (1) *Failure to deny partnership: Waiver of statutory presumption.* (2) *Assignment of claim: Who to bring action.* (3) *Reading portion of party's testimony.* (4) *Submitting case to jury without instructions.*

1. In an action upon contract the defendant alleged that the contract was made with the plaintiff and another person as partners. This allegation was not denied by affidavit, as required by sec. 4197, R. S. (which provides that if not so denied it shall be taken to be true), but the question of partnership was litigated on the trial without objection on the part of the defendant. *Held*, that this was a waiver on his part of the statutory presumption.
2. Under sec. 2605, R. S., providing that actions must be brought in the name of the real party in interest, a partner to whom his copartner has assigned a partnership claim must sue thereon in his own name.

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3. A party who has testified in his own behalf cannot object to the reading of his cross-examination by counsel in the closing argument to the jury on the ground that it is not a fair statement of his testimony. His remedy is to insist that all his testimony be read.
4. Sec. 2853, S. & B. Ann. Stats., does not require the trial judge to instruct the jury in every case. And a party who does not ask that the jury be instructed either generally or specifically will be deemed to have assented to the submission of the case to the jury without instructions.

APPEAL from the Circuit Court for *Crawford* County.

The case is stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief by *Webster & Miller*, and oral argument by *D. Webster*. To the point that, even in the absence of statutory provisions, it is the duty of the judge to give all necessary instructions to the jury, whether so requested by counsel or not, they cited *Owen v. Owen*, 22 Iowa, 270: *State v. Brainard*, 25 id. 572; Wells, Law & Fact, 288, sec. 336; *Potter v. C., R. I. & P. R. Co.* 46 Iowa, 399; *Dassler v. Wisley*, 32 Mo. 498.

For the respondent the cause was submitted on the brief of *Fuller & Ward.*

The following opinion was filed June 21, 1890.

TAYLOR, J. This action was commenced in justice's court to recover a balance alleged to be due from the defendant, *Fritsche*, to the plaintiff *Stuckey*, for drilling a well for the defendant. Plaintiff recovered in the justice's court, and *Fritsche* appealed to the circuit court. In that court the defendant filed an amended answer, denying the indebtedness, and setting up that the contract for drilling the well, and under which the plaintiff acted, was a contract made with the plaintiff and his brother, William Stuckey, as partners in business, and that by such contract they agreed to drill a well 300 feet deep unless they procured a flow of water at a less depth or unless the defendant directed them

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to quit before going to such depth, plaintiff and his partner to have one dollar per foot for the depth drilled, not to exceed 300 feet; and alleges that after drilling the well about 130 feet, the plaintiff and his partner quit work without having procured a flow of water and without the consent of the defendant. On the trial in the circuit court the plaintiff recovered a verdict for $47.

The real contest on the trial of this case was whether there was a contract between the plaintiff and the defendant by which plaintiff agreed to drill the defendant a well 300 feet deep unless he procured a flow of water before reaching such depth or unless sooner discharged by the defendant. The plaintiff denied that the agreement was to drill to the depth of 300 feet or any particular depth. After a careful consideration of the evidence, we think there is a clear preponderance in favor of the agreement to drill 300 feet unless a flow of water was sooner obtained or unless the defendant consented for any reason to stop short of the 300 feet. The evidence shows that, after the plaintiff had drilled about 140 feet, his sand bucket stuck in the well, and it was difficult to get it out and continue the drilling. The evidence on the part of the plaintiff tends to show that at this time plaintiff had a talk about continuing the work further, and the probability of getting a flow of water was discussed between the parties, and that, in view of the doubt upon that point, the defendant consented that plaintiff should stop work upon the well until he could procure a survey of the locality in order to determine whether it was probable that a flow of water could be got at that place; that thereupon the plaintiff stopped work on the well, and the defendant, though requested to pay for the work done, had neglected to do so, and had neglected to procure a survey of the locality, as he said he would do, until after the commencement of this action. And there is no satisfactory evidence that the defendant, at any time before the com-

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mencement of this action, directed the plaintiff to continue his work on said well until he reached the depth of 300 feet or any other particular depth, or until the plaintiff should procure a flowing well.

The first and second errors alleged are that the verdict is wholly unsupported by the evidence. We think there is no merit in these objections to the verdict. If the testimony of the plaintiff and his witnesses was believed by the jury, then the verdict is supported by their evidence. The weight of the testimony and the credibility of the witnesses were questions for the jury and not for the court. But it is in some way claimed that, because the defendant alleged in his answer that the contract was made, not with the plaintiff alone, but with the plaintiff and his brother William as partners, and as this allegation was not denied by affidavit, as required by the statute (see sec. 4197, R. S.), no verdict or judgment could be legally rendered in favor of the plaintiff alone. There are, we think, two sufficient answers to this contention:

First. The question of the partnership of the plaintiff with his brother William was litigated on the trial without objection on the part of the defendant, and he cannot now avail himself of any advantage given him by the statute. The fact that it was so litigated without objection gives plausibility to the statement of the learned counsel for the respondent that the partnership was in fact denied by affidavit as required by the statute, but that by some oversight the affidavit was not sent up as a part of the record. However that may be, the consent to litigate the question without objection was, we think, a waiver of the statutory presumption arising upon the pleadings. The clear preponderance of the evidence was, we think, in favor of the claim that there was no partnership.

Second. Had the evidence shown that there was a partnership contract as alleged in the answer, still the evidence

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would sustain a verdict in favor of the plaintiff alone, from the fact that it was shown on the trial that any interest the plaintiff's brother William had in this contract, either as partner or otherwise, had been transferred to the plaintiff before this action was commenced. We are not aware of any rule of law which prevents one partner from assigning to his copartner his interest in any particular debt due such partners; and under our Code of Procedure, when such claim is so assigned, the individual partner may, and in fact must, sue upon it in his own name. See sec. 2605, R. S.

Many objections and exceptions were taken to the introduction of evidence on the part of the plaintiff, as well as to the rejection of evidence offered on the part of the defendant. After a careful reading of all the evidence in the case, we are of the opinion that the rulings of the court upon the several objections and offers were not erroneous. Most of the exceptions and objections related to matters which might tend to prove a partnership between the plaintiff and his brother William, and, as we have said above, this matter of partnership was wholly immaterial, except in so far as it had a bearing upon the question of how far the declarations of William were admissible as evidence in favor of the defendant. After reading the evidence, we do not find that any material declarations or statements made by William in regard to the transaction were rejected by the court.

Objections and exceptions were made to remarks made by the trial judge during the progress of the trial. These remarks, as they appear in the record, do not present such a violation of propriety on the part of the learned judge as would authorize this court to declare them errors of so grave a character as to justify a reversal of the judgment.

It is also objected that the plaintiff's counsel was permitted to read to the jury in his closing argument, from the minutes of the reporter, the cross-examination of the de-

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fendant as a witness in his own behalf. We do not think this was error. If the defendant was of the opinion that the evidence brought out on his cross-examination was not a fair statement of what he in fact testified to on the trial, his remedy was not by objecting to the use of his cross-examination in the argument of the plaintiff to the jury, but he should have insisted, if he so desired, that all his evidence should be so read to the jury. This he did not ask to have done.

After the counsel had argued the case to the jury, the learned circuit judge gave no charge or instructions to the jury, but made the following remark: "I have no charge to give you, gentlemen. Conduct the jury to their room." No exception was taken at the time by the learned counsel for the defendant to the declination of the learned judge to instruct the jury; neither did he request the judge to instruct them generally, nor request that any specific instruction should be given to them. On making a motion for a new trial, the learned counsel for the defendant assigns this as a reason for granting the same, in the following language, as his ninth reason: "The court erred in not instructing the jury in the law applicable to the case." The learned counsel for the appellant claims that it is the duty of the trial judge to instruct the jury in every case upon the law of the case, whether requested to do so or not; and he cites sec. 2853, S. & B. Ann. Stats.,[1] as imposing such duty upon the trial judge. We are clearly of the opinion that this section was enacted for the purpose of requiring

[1] Sec. 2853, S. & B. Ann. Stats., provides: "Upon the trial of every action, the judge presiding shall, before giving the same to the jury, reduce to writing and give as written his charge and instructions to the jury, and all further and particular instructions given them when they shall return after having once retired to deliberate, unless a written charge be waived by counsel at the commencement of the trial; and except that the charge or instructions may be delivered orally when taken down by the official phonographic reporter of the court. . . ."—REP.

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the instructions, when given, to be given in *writing*, unless the giving of them in writing was waived by the parties, and was not enacted for the purpose of making it the duty of the trial judge to instruct the jury in any and every case. This was so held by this court in *Hepler v. State*, 58 Wis. 46, 49. The same rule is adopted in New York. *Haupt v. Pohlmann*, 1 Rob. (N. Y.), 121; *Graser v. Stellwagen*, 25 N. Y. 315. It was also held that an exception for a refusal to instruct the jury as requested by the counsel must be taken on the trial in order to be available to the party complaining of such refusal. *Murphy v. Martin*, 58 Wis. 276; *Collins v. Shannon*, 67 Wis. 441; *Firmeis v. State*, 61 Wis. 140; *Adams v. McKay*, 63 Wis. 404, 408; *Gardner v. Gooch*, 48 Me. 487. We think it very clear that the defendant waived any right to insist upon the trial judge instructing the jury, by not taking exception to his declining to give instructions. Had he desired the judge to instruct the jury, he should have either made a general request that the judge instruct the jury upon the law of the case, or have offered specific instructions and requested the judge to give the same to the jury. Having done neither in this case, he must be deemed to have assented to submitting the case to the jury without instructions.

By the Court.— The judgment of the circuit court is affirmed.

A motion for a rehearing was denied September 23, 1890.

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BAILEY and others, Respondents, vs. THE ÆTNA INSURANCE COMPANY, imp., Appellant.

September 2 — September 23, 1890.

INSURANCE. *(1, 2) Pleading: Action at law or in equity? Parties: Demurrer. (3) Arbitration: Condition precedent to action.*

1. An action upon a policy of insurance against fire to recover the amount of a loss is not in equity although, in addition to the money judgment, the complaint prays for such further relief as may be equitable; and a general demurrer cannot be sustained on that ground.
2. Where the property destroyed was a homestead and the action is brought by the widow of the insured, as such and as administratrix, the fact that the heirs of the insured are also joined as plaintiffs does not make the action one in equity or render the complaint demurrable.
3. An insurance policy provided that in case of a difference as to the amount of any loss or damage it should be submitted to arbitrators, and that no action against the company for the recovery of any claim for loss should be sustained unless an award by arbitrators had first been returned. *Held*, that these provisions did not apply to a case where the company denied all liability whatever on the policy.

APPEAL from the Circuit Court for *Winnebago* County.

Action upon a policy of insurance against fire. The facts will sufficiently appear from the opinion. The defendant insurance company appeals from an order overruling its general demurrer to the complaint.

For the appellant there was a brief by *Miller, Noyes & Miller*, and oral argument by *B. K. Miller, Jr.* They contended, *inter alia*, that after loss an action upon an insurance policy should be at law, but these plaintiffs have sued in equity. The nature of the action must be determined by the prayer for relief. *Gillett v. Treganza*, 13 Wis. 476; *Cobb v. Smith*, 23 id. 265; *Kewaunee Co. v. Decker*, 30 id. 624; *Lowber v. Connit*, 36 id. 182.

Wesley Mott, for the respondents.

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COLE, C. J. It seems to us that there is no room to doubt as to the nature of this action. The complaint is clearly to recover the amount due on a policy of insurance. It states what property was insured by the defendant company, the amount of the insurance, the destruction of the insured property by fire, the furnishing of proofs of loss, and demands judgment against the company for the amount of the loss, viz., the specified sum of $928, with interest. It is a plain, ordinary action at law upon a contract of insurance. It is true the complaint not only demands judgment for the sum just stated, but also asks judgment for costs and disbursements, "and for such other or further order, judgment, or relief as may be equitable." But this clause for other relief than a money judgment does not change the action to one equitable, nor render the complaint demurrable. This court has followed the rule, in a case of doubtful pleading, of looking at the prayer for relief to determine the nature of the action; but that rule is one only resorted to in case of actual doubt upon the facts set forth or statements made. But there is nothing uncertain, ambiguous, or doubtful, upon the allegations of the complaint. It is a plain action at law to recover the amount due upon the policy of insurance. There may be unnecessary matter stated and relief asked not strictly legal, but this redundant matter does not vitiate the complaint or change the character of the action. This point we deem so clear as to require no further comment.

The principal property insured in this case was a dwelling-house, which constituted the homestead of the insured. The property was destroyed after the death of the insured and while occupied as a homestead. The children or heirs at law of the insured, together with the widow, who sues as such widow and also in her representative capacity as administratrix of her husband's estate, and certain mortgagees to whom a portion of the loss is made payable, have been

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made parties to the action. It is said if this is a legal action the heirs are improper parties plaintiff. But the general rule is that a demurrer does not lie for an excess of parties plaintiff. On the death of the insured the homestead descended to the widow during her widowhood, and to the children on her marriage or death. Upon the facts, we see no objection to making the heirs parties to the suit. At all events, it is not ground for a demurrer that they are made parties, and certainly does not change the action to one in equity.

The policy contains this clause: "XVII. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim for loss by virtue of this policy shall be sustained in any court of law or chancery, unless an award of damages by arbitrators as herein provided for shall first have been returned, and unless such suit or action shall be commenced within the term of twelve months next after the fire shall have occurred; and in case any such suit or action shall be commenced against this company without such award shall have been returned, or after the expiration of twelve months next after such fire shall have occurred, in either case it shall be taken and deemed as conclusive evidence against the validity of the claim thereby attempted to be enforced." There is an allegation in the complaint that the company has at all times denied all liability to pay any sum whatever on the policy, but there is no averment that any award of damages by arbitrators has been made. It is insisted that such an award was essential and constituted a condition precedent to the right to bring an action on the policy. We cannot adopt this construction of the instrument. The next preceding clause in the policy provides, in substance, in case a difference shall arise touching the amount of any loss or damage, it shall be submitted to the judgment of arbitrators mutually chosen to determine

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the extent or amount of the loss. The award which is referred to in the seventeenth clause relates to the case of differences between the parties touching the amount of the loss, and has no reference to a case where the company denies all liability or obligation to pay. The award was to be on the question of loss or damage, where difference should arise, and this may be possibly a condition precedent to sue in a case to which it is applicable; but it does not apply where the company denies all liability whatever upon the policy. It is apparent that no difference of opinion touching the amount of loss could arise where all liability was denied. The parties might well agree to submit the amount of loss in case of a disagreement to arbitrators, yet not be willing to submit the question of the liability of the company to such a board. However that may be, it is clear that the parties have not stipulated to submit the question of the liability of the company to arbitrators before a suit upon the policy can be maintained upon it.

The effect of such conditions in policies of insurance has frequently been considered by courts, and we know of no case which holds that a stipulation in the policy to arbitrate a certain matter might be extended so as to embrace other questions not fairly within such stipulation. See *Phœnix Ins. Co. v. Badger*, 53 Wis. 283; *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419; *Oakwood R. Asso. v. Rathborne*, 65 Wis. 177.

It follows from these views that the order of the circuit court, overruling the demurrer to the complaint, must be affirmed, and the cause be remanded for further proceedings according to law.

By the Court.— It is so ordered.

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LEE, Respondent, vs. CAMPBELL and others, Appellants.

September 2 — September 23, 1890.

(1, 4) Action, tort or contract? Erroneous statement of counsel. (2, 3) Sale of chattels: Evidence. (5) Appeal: Bill of exceptions.

1. A complaint alleged that defendants agreed to purchase about 35,000 feet of logs from plaintiff and to pay him therefor $10 per thousand feet; that they afterwards pretended to purchase said logs from a third person, although plaintiff had notified them that he was the owner and forbade such purchase; that the logs were delivered to defendants, and that they thereby became indebted to plaintiff in the sum of $357.10, which they had not paid; and judgment was demanded for that sum. *Held*, that the action was upon the implied promise to pay for the logs, the tort being waived.
2. In such action evidence that defendants agreed to pay said third person $10 per thousand feet for the logs, is sufficient proof, *prima facie*, of their value.
3. Correspondence between the parties relative to the purchase of logs, but naming a mark different from that on the logs in controversy, was admissible, there being other testimony tending to show that it did, in fact, relate to such logs.
4. An erroneous statement by plaintiff's counsel, at the commencement of the trial, as to the nature of the action, which did not mislead the defendant, is not ground for reversal of the judgment.
5. Where the bill of exceptions is not certified by the trial judge to contain all the evidence, it will be presumed that every fact pleaded which is essential to support the judgment was proved on the trial.

APPEAL from the Circuit Court for *Winnebago* County.

This is an action to recover the value of about 35,000 feet of pine saw-logs. It is alleged in the complaint that the defendants agreed to purchase them of plaintiff, and to pay him therefor $10 per thousand feet, but that afterwards they pretended to purchase the same of one Lord, although the plaintiff had theretofore notified them that he was the owner thereof, and forbade them to purchase the logs of any other person; that the logs were delivered to the defendants, June 18, 1888, whereby they became indebted to

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the plaintiff therefor in the sum of $357.10, which they have not paid. Judgment is demanded for that sum, and for interest and costs. The answer is in substance a denial of the material allegations of the complaint. A trial resulted in a verdict for the plaintiff for $167.25,— presumably for 15,000 feet at $10 per thousand,— and interest thereon from the time the logs were delivered to defendants. A motion for a new trial was denied, and judgment for the plaintiff entered pursuant to the verdict. The case is further stated in the opinion. The defendants appeal from the judgment.

For the appellants there was a brief by *Hicks, Phillips & Kleist*, and oral argument by *M. C. Phillips*.

H. W. Lee, respondent, in person.

LYON, J. I. There is a controversy as to the nature of the action. The circuit judge held it to be an action *ex contractu*, brought to recover the value of the logs on the implied promise of the defendants to pay for them — the tort being waived. We think this the correct construction of the complaint. Since the case of *Norden v. Jones*, 33 Wis. 600, there can be no doubt that in this case the tort may be waived and an action maintained on the implied *assumpsit* for the value of the logs.

At the commencement of the trial, counsel for plaintiff stated, in substance, that he understood the complaint to state a cause of action upon contract, and further that he claimed a bargain and sale of the logs by plaintiff to defendants, and should proceed on that theory. If that statement confines the plaintiff to a recovery upon an express contract (and we think it does not), we must assume that he proved such express contract, for the reason that the bill of exceptions is not certified by the judge to contain all the testimony. There is a certificate of the official reporter to that effect following the certificate of the judge to the bill,

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but that is of no value or significance. In case of the absence of such certificate of the judge, the presumption is that every fact pleaded which is essential to support the judgment was proved on the trial.

It is said that counsel for plaintiff afterwards claimed that the action is trover. We think the fair import of his language, as contained in the bill of exceptions, is that he did not claim on an express contract, but on the promise of defendants to pay for the logs which the law implies from the wrongful conversion of them. The case must be determined, however, upon the pleadings and proofs, and not on any mistaken views of counsel as to the nature of the action, which did not mislead the defendants. The case has been fully tried as an action *ex contractu*, and the defendants were not prejudiced by the alleged remarks of counsel.

Although, for the reason stated, we must assume that every fact essential to a recovery by the plaintiff was proved, it should be observed that the testimony preserved in the bill of exceptions tends to prove all such facts. It tends to prove that the logs in question were wrongfully cut on plaintiff's land by the agent of Lord, and sold and delivered by the latter to the defendants, and that they had notice before they paid Lord therefor that the plaintiff was the owner of the same. Indeed, it is neither averred nor proved that the defendants have paid Lord therefor. This is sufficient to support the verdict and judgment, even though the defendants never agreed with plaintiff for the purchase of the logs.

II. Certain correspondence between the parties relative to a purchase and sale of logs, but naming a different mark than that on the logs in controversy, was received in evidence, against the objection of defendants. Other testimony in the case tends to show that the correspondence related to the logs in controversy, notwithstanding the discrepancy in the marks. The correspondence is not very material, as

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it does not relate to the implied *assumpsit* upon which the judgment rests. But were it material, we think there was no error in admitting it.

The action is for the value of the logs, so far as it rests on the implied *assumpsit*. There is no direct allegation of value in the complaint. But the testimony contained in the bill of exceptions tends to show that defendants agreed to pay Lord $10 per 1,000 feet for them. This is sufficient proof, *prima facie*, of their value.

The foregoing views dispose of all the errors alleged for reversal adversely to the defendants.

By the Court.— The judgment of the circuit court is affirmed.

SMITH, Appellant, vs. COLEMAN, Respondent.

September 2 — September 23, 1890.

(1) Parol evidence to vary written contract. (2, 3) Appeal: Exceptions: Waiver.

1. A writing whereby the lessee of an engine agrees to accept it and keep it thirty days and pay a specified sum per day, signed only by said lessee and containing no agreements on the part of the lessors, does not preclude parol proof that such lessors warranted the engine to be in good repair and fit to perform the work for which it was leased.
2. An exception to the whole of the charge to the jury is too general to be available on appeal.
3. The right to appeal from an order is waived by a party who accepts the costs awarded to him as the condition upon which the order was granted.

APPEAL from the Circuit Court for *Winnebago* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

The appellant brought an action in the circuit court against the respondent upon the following writing:

"Fond du Lac, Aug. 29, 1883.

"The undersigned agrees to accept Case engine, and

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keep same thirty days, and pay $3.50 per day, return it to Fond du Lac free of charge, and keep same in repair. Time it is undergoing repairs to be deducted.

"[Signed] T. A. COLEMAN."

On the trial, the plaintiff established by his evidence that M. W. Marshall and C. H. Marshall were the owners of said Case engine at the time said memorandum was signed by the respondent, *Coleman*, and that said memorandum was delivered to them by *Coleman* at the time the same was dated, and that at the time the same was dated they delivered the engine to said *Coleman*. He also showed that, previous to the commencement of this action, the said Marshalls had assigned to him all their rights and claims arising out of the letting of said engine to said *Coleman*.

As a defense to the action, the respondent, *Coleman*, answered, "that, at the time the defendant signed the agreement set forth in the plaintiff's complaint, said M. W. and C. H. Marshall represented to this defendant that said engine was in good repair, and in good running condition, and would do the work for which the defendant hired the same; that defendant took said engine and tried to run it, but it would not run and would not do the work for which defendant hired it; that, after trying the same three days, the defendant notified the said M. W. and C. H. Marshall that said engine would not run, and was out of repair, and could not be made to do the work defendant wanted it to do; that said engine was at Oshkosh, subject to their order; that said M. W. and C. H. Marshall ordered defendant to return said engine to them, and defendant did so. Wherefore, the defendant demands judgment against the plaintiff that the plaintiff's complaint be dismissed, with the costs of this action."

The defendant on the trial, against the objections of the plaintiff, gave evidence tending to prove his answer in all its particulars. No other witness testified on the part of the defendant. The plaintiff introduced C. H. Marshall,

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one of the owners of the engine, who testified that no representations were made to the defendant as to the qualities or condition of the engine, or that it was in good repair, and that the defendant examined the engine before he took it and signed the memorandum; he also testified that the engine was in good order, except it "wanted some packing about the pumps,— common hemp packing." He also testified that he did not direct *Coleman* to return the engine, as stated by him. The only witnesses examined were the defendant on his own behalf, and Marshall on behalf of the plaintiff.

The case was submitted to the jury by the judge, who instructed them in substance "that if they found from the evidence that, at the time the defendant hired the engine, it was represented to him by the Marshalls, or either of them, that it was in good condition and would do the work for which it was hired, and which purpose was known to the Marshalls, and if they further found that it would not do the work and was practically useless, then the plaintiff could not recover." There was no exception to the charge of the judge, except a general exception to the whole charge of the court. The jury found for the plaintiff, and assessed his damages at six cents.

Before judgment, the plaintiff moved to set aside the verdict and for a new trial. The motion was made upon the pleadings and files, and upon the pleadings and evidence taken on the trial: (1) Because the verdict is perverse and against the evidence, and damages inadequate; (2) that the verdict is contrary to law; (3) that the court erred in its charge to the jury; (4) that the court erred in admitting incompetent and immaterial evidence on behalf of the defendant on the trial. This motion was probably denied, although there is nothing in the record showing the fact, except the fact that judgment was entered upon the verdict.

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By the papers and files returned by the clerk of the circuit court to this court, it appears that a judgment had been entered by default in favor of the plaintiff and against the defendant, for the sum of $123.70 damages, and $16 costs. This judgment is dated May 2, 1885, and is signed by the clerk, but is not marked as filed by the clerk in his office until the 13th of September, 1887. The papers returned also disclose that, upon the motion of the defendant, this judgment was set aside and vacated by an order of the court dated December 15, 1887. The files returned contain affidavits purporting to be made in support of the motion to set aside said judgment, and also affidavits in opposition to such motion. The order setting aside the judgment recites as follows: "This cause coming on to be heard upon the order to show cause why the judgment entered and docketed herein, September 13, 1887, in favor of the plaintiff and against the defendant, should not be set aside and vacated. . . . Ordered that the said judgment be, and the same is hereby, set aside and vacated, and defendant have leave to answer herein within twenty days from the date hereof, upon payment to plaintiff of $13.70 costs, such costs to be paid within twenty days from the date of this order, and, if not so paid, then this order to be void and of no effect and said judgment to remain of same effect as though this order had not been made."

Charles D. Smith, appellant, in person.

For the respondent there was a brief by *Williams, Friend & Bright*, and oral argument by *A. H. Bright.*

TAYLOR, J. The only exception taken on the trial and which is available to the appellant on this appeal is the exception taken to the introduction of the evidence on the part of the defendant tending to show that the plaintiff warranted that the engine was in good repair and would perform the work which the defendant leased it for. The

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contention on the part of the plaintiff is that the written memorandum which was signed only by the defendant was conclusive as to what the contract between the parties in relation to the engine was. We think the learned circuit judge was clearly right in overruling this objection. The evidence offered does not in any way contradict or change the writing signed by the defendant. That writing contains no contract of any kind on the part of the plaintiff's assignors in relation to the matter, except that it implies that they consented that the defendant should have the use of the engine for thirty days, for the fixed sum of $3.50 per day. The case is clearly within the rule laid down by this court in the cases of *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240; *Hahn v. Doolittle*, 18 Wis. 196; *Frey v. Vanderhoof*, 15 Wis. 398; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120, 136; *Jilson v. Gilbert*, 26 Wis. 637; *Green v. Batson*, 71 Wis. 54; *Merriam v. Field*, 24 Wis. 640; *Collette v. Weed*, 68 Wis. 428, 434; and *Boothby v. Scales*, 27 Wis. 626.

These cases fully sustain the ruling of the learned circuit judge in this case. The ruling is not in conflict with the cases in this court which hold that when there is a written contract for the sale of chattels, which writing contains an express warranty as to some matter in regard to the thing sold, no other express warranty can be shown by parol proofs. *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 626, 633. In the case at bar, the written memorandum was not signed by the plaintiff's assignors, and it contains no agreement of any kind on their part. It is clear, therefore, that the parol evidence offered by the defendant tending to show that at the time of his leasing the engine, and as a consideration for his so doing, they warranted the engine to be in good repair and fit to perform the work for which he leased it, does not in any way contradict or vary the contract on the part of the defendant.

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The exception to the instructions given by the learned judge is too general to be regarded on this appeal. There was no error in refusing to set aside the verdict and grant a new trial. There was certainly sufficient evidence to sustain the verdict, notwithstanding the contradictory evidence of the plaintiff's witness, Marshall. The credibility of the two witnesses was for the jury, not for the court. The learned circuit judge having expressed his satisfaction with the verdict, and such verdict being sustained by evidence, this court will not interfere.

The appellant contends that this court should, upon this appeal, pass upon the question of the right of the circuit court to set aside the judgment taken by default in the action. We think there is very grave doubt as to the right of the plaintiff to avail himself of any error, if there be any, in setting aside such judgment on his appeal from this judgment. It is doubtful whether the record in the case brings before this court the proceedings upon the motion to set aside the default in the action. But, as it is evident from what appears in this record that the appellant must have received and accepted the costs awarded to him by the court as a condition of opening the default of the defendant, he has waived any right to complain of such order. Having received from the defendant the benefit of the order on his part, he cannot object to the defendant's claiming the benefit of the same order on his part. If the plaintiff ever had a right to appeal from such order, he has waived it by accepting the costs awarded to him as the condition upon which the order was granted to the defendant. *Cogswell v. Colley*, 22 Wis. 399; *Flanders v. Merrimac*, 44 Wis. 621; *Webster-Glover L. & M. Co. v. St. Croix Co.* 71 Wis. 317, 319.

By the Court.— The judgment of the circuit court is affirmed.

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PHILLIPS, Administratrix, Respondent, vs. THE MILWAUKEE & NORTHERN RAILROAD COMPANY, Appellant.

September 2 — September 23, 1890.

***Railroads: Killing of person at sidewalk crossing:** Contributory negligence: Failure to see approaching cars.*

Plaintiff's intestate was last seen alive walking beside a switch track in defendant's yard, going eastward towards a street which crossed said yard from north to south. It was a cold and stormy day, and he had a shawl about his head and ears. His dead body was found on the switch track about fifteen feet east of a sidewalk which ran along the west side of said street. Blood was found on the east side of that sidewalk and thence along the track to the spot where the body was found. He had been struck and killed by cars which had passed him going westward and had then been pushed upon said switch track and negligently left to run eastward unattended. Upon the evidence, showing the foregoing facts among others, it is *held* that the jury might properly have found that the deceased, when struck by the cars, was on the sidewalk, where he had a right to be, and that he was not guilty of any contributory negligence in failing to see the cars as they approached him.

APPEAL from the Circuit Court for *Winnebago* County.

Action to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant's employees. The facts are sufficiently stated in the opinion. There was a general verdict in favor of the plaintiff, assessing her damages at $833; a motion for a new trial was denied; and from the judgment entered on the verdict the defendant appealed.

For the appellant there was a brief by *Alfred H. Bright*, attorney, and *Charles W. Felker*, of counsel, and oral argument by *Mr. Bright*. To the point that one who goes upon the track and is struck by a train which is in plain sight when the crossing is attempted, cannot recover either on the presumption that he looked or on his own evidence that he did look, they cited *Marland v. P. & L. E. R. Co.* 123 Pa. St. 487; *Penn. R. Co. v. Mooney*, 126 id. 252; *Carroll*

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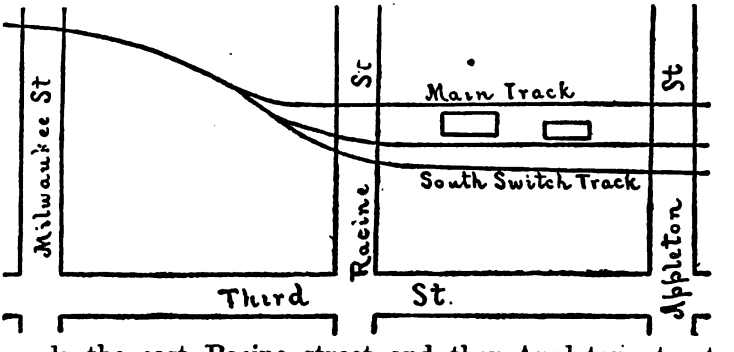
v. P. R. Co. 12 Weekly Notes, 348; *Penn. R. Co. v. Bell*, 122 Pa. St. 58; *Wilcox v. R., W. & O. R. Co.* 39 N. Y. 358; *Grippen v. N. Y. C. R. Co.* 40 id. 35, 51; *Davis v. N. Y. C. & H. R. R. Co.* 47 id. 400; *Reynolds v. N. Y. C. & H. R. R. Co.* 58 id. 248; *Mitchell v. N. Y. C. & H. R. R. Co.* 64 id. 655; *Tolman v. S., B. & N. Y. R. Co.* 98 id. 198, 204; *Benton v. C. R. Co.* 42 Iowa, 192; *Pence v. C., R. I. & P. R. Co.* 63 id. 746; *Bloomfield v. B. & W. R. Co.* 74 id. 607; *Cones v. C., I., St. L. & C. R. Co.* 114 Ind. 328; *Chicago & E. I. R. Co. v. Hedges*, 118 id. 5; *Chase v. M. C. R. Co.* 78 Me. 346; *Rogstad v. St. P., M. & M. R. Co.* 31 Minn. 208; *Brown v. M. & St. P. R. Co.* 22 id. 165, 167; *Schofield v. C., M. & St. P. R. Co.* 8 Fed. Rep. 488; *S. C.* 114 U. S. 615; *Achtenhagen v. Watertown*, 18 Wis. 331; *Rothe v. M. & St. P. R. Co.* 21 id. 256; *Langhoff v. M. & P. du C. R. Co.* 23 id. 43; *Schilling v. C., M. & St. P. R. Co.* 71 id. 255.

For the respondent there was a brief by *Bouck & Hilton* and *Smith & Schoetz*, and oral argument by *Gabe Bouck*.

ORTON, J. In the city of Menasha there are three streets running north and south, viz.: Milwaukee street and, to-



wards the east, Racine street and then Appleton street. The railroad of the appellant company, coming from the west, after it crosses Milwaukee street runs in a south-

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easterly direction towards Racine street, and then crosses Racine and Appleton streets in a due easterly direction. The depot grounds lie between Milwaukee and Appleton streets, and the depot buildings are situated between Racine and Appleton streets. From some distance west of Racine street there is a main switch track south of the main track, running east across Racine street; and a short distance east of that switch there is another switch track running east, also across Racine street, and some distance south of the other switch track. The deceased lived northwest of the company's yard, and on the morning of the 4th day of April, 1887, had left his home to go to church on Appleton street, southeast of the yard, through the company's grounds, as he had been accustomed to do. The weather was cold and stormy, and he had on a heavy overcoat, a cap, and a shawl about his face and head. The men doing the switching protected themselves by staying on the engine when not throwing a switch, and the persons usually around the depot were inside. Five loaded cars had been taken from east of Racine street, and two of them were cut off and kicked west on the main line, and the remaining three cars were kicked east on the south switch track, to run unattended over Racine street. The deceased was first seen by the engineer and other employees walking eastwardly on the main track west of the switches, and then again further east on the north side of the main track, and then *lastly* on the south side of the south switch track going towards Racine street. He was met and passed by the five cars going west. There was a sidewalk on the west side of Racine street from Third street south, across both of the switch tracks towards the north. Soon afterwards the crushed and mangled body of the deceased was found partly on the south switch track about fifteen feet east of the sidewalk. The upper part of it was lying south of the south rail and the feet over it. Blood was found on the east side of the sidewalk on the south switch track, and

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from there blood was trailed along on the track to where the body was found. Some of the witnesses of the defendant testified to seeing one or two drops of blood about fifteen feet west of the sidewalk on the track; but the witnesses of the plaintiff testified that they examined the track for blood spots at that place, and could not find any. The jury had the right, therefore, to treat such fact as unproved, as they evidently did. It is therefore reasonable to suppose that the deceased was struck by the cars on the sidewalk where it crosses the south switch track, and his body dragged to where it was found.

There being no witness to this painful accident, how the deceased came to be on the sidewalk at that place, and whether walking north or south on it, must be determined, if at all, by circumstantial evidence. The learned counsel of the appellant contends that it is unaccountable how the deceased came to be there, and that it is entirely a matter of conjecture. That may be so, but is it necessary that the plaintiff account for his being on the sidewalk at that time and place? If it is shown that he met his death while walking on the sidewalk, where he had a right to be, that is sufficient for the plaintiff's case, and it is incumbent on the defendant to show that he was guilty of any want of ordinary care in placing himself in that position. It is therefore incumbent on the defendant to account for his being there, and if there is no proof of it, and it is all a matter of conjecture, then it follows that the deceased is presumed to have placed himself where he was killed, with due care, or at least without any want of ordinary care. The learned counsel says in his brief: "Admitting that the deceased had reached that place when struck, is not the manner of his coming there left to conjecture? But verdicts cannot rest upon conjecture." The verdict in this case does not rest on any conjecture as to how he came there. The verdict for the plaintiff rests rather on the fact alone that he was lawfully there, where he had a right to be, when he was killed.

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If the manner of his coming there was not shown, then no negligence of the deceased could be predicated upon it. That was the misfortune of the defendant and not of the plaintiff. We will not, therefore, consider the plausibility or otherwise of any of the theories of the learned counsel as to how the deceased came to the place where he was killed.

The main and important question is, Was he struck by the cars while he was on the sidewalk? It seems to be conclusively shown that he was struck and killed at that place. No marks of blood or any traces of his presence on that track, west of the sidewalk, were found. The presumption is that he was struck and killed where the first blood in that direction was found, which was on the sidewalk, and that he was dragged by the car to where his body was found, as the cars were going in that direction. There is no evidence whatever that the deceased walked on the track from the west to the sidewalk, and it is reasonable to conclude that he was walking in the direction of the sidewalk, north or south, for this is the ordinary use of a sidewalk. This is not conjecture, but a reasonable inference or deduction from these known facts. The presumption is that he was making the ordinary use of that sidewalk by traveling on it when he was struck by the car. It would not be a reasonable, but it would be a violent, presumption that he came to the sidewalk from the north while walking on the defendant's track. He would be a trespasser, and do that which was unlawful, to so use the track, and this cannot be presumed. So far, then, the negligence of the deceased is not shown.

The only other evidence of his want of care, it is contended, was the fact that he did not look or listen before crossing the track or attempting to cross it. The contention of the learned counsel of the appellant is that if he had looked he would have seen the cars coming towards that point from the west, and that if he had seen them it

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was negligence on his part to attempt to cross the track as he did, and that therefore he did not look, and that he was guilty of a want of ordinary care in not doing so. This contention is correct if there is nothing in the circumstances to excuse his not looking or his not seeing the cars approach, or to mitigate the consequences of such omission. This has been so often decided by this court that I need only to refer to the cases cited in the appellant's brief. It is said that he ought to have looked west for the approach of these cars. Why look west, any more than east. And perhaps he did look east, and seeing none he attempted to cross over. At such a point, where a great deal of switching is done in all directions, out of as well as into side tracks, the deceased may have had greater reason to look east for the approach of cars at that time than in the opposite direction. Let us see. He had been met by the train of five cars attached to the engine just before, and had stepped off the track for them to pass. It is not known that he walked on the track after that. He was last seen walking some distance south of the south switch track towards Racine street. He had reason to suppose that the train he met would pass on towards the west on the main track. It was after he had met the train of five cars going west that the two cars had been detached and kicked west on the main track, and the three remaining cars had been kicked east on the south switch track. Those occurrences took place behind him, and he probably knew nothing of them. He might have well supposed that the train would keep on westwardly, or at least that it would not return to pass down the south side-track. He was thus deceived and thrown off his guard, and had no reason to expect that any of those cars would interfere with his crossing the side-track on the sidewalk, or that they would so soon be sent down that track without any one to look after them or to take care of them. The jury might well have excused the deceased from looking for any of these cars on the south side-

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track going east at that time, and have found that he was not guilty of any contributory negligence, under these peculiar circumstances. This view of the case is justified by the late cases of *Ferguson v. W. C. R. Co.* 63 Wis. 145, and *Duame v. C. & N. W. R. Co.* 72 Wis. 523. The jury may also very properly have considered the facts that it was a cold and stormy day, and that the deceased had a shawl about his head and ears, which might have interfered to some extent with his seeing as well as hearing. It was not a day for taking observations, but for keeping straight on. The employees of the road kept themselves protected from the weather on the engine, where they could not look out for these wild detached cars that they had sent down the track, or warn the deceased of their approach. These facts may well modify the rule that it was the duty of the deceased to *look* just at the time when the cars were near him. It may be that he had looked in that direction, but when these detached cars had not yet started on the side-track. He is not here to be questioned as to what he did or did not do, and his conduct is entitled to all reasonable probabilities. One thing is certain,— that he did not know that these cars were creeping towards and so near him when he undertook to cross the track.

We think the jury might have properly found, as they did, that the deceased was not guilty of any want of ordinary care, under the circumstances of the case, that contributed to his death.

These are the only controverted questions in the case. The learned counsel of the appellant does not contend that the defendant company was not guilty of a want of ordinary care in thus sending down the track these unguarded cars, and across the traveled streets of the city. We find no errors in the case.

By the Court.— The judgment of the circuit court is affirmed.

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BARTLETT, Appellant, vs. BEARDMORE and others, Respondents.

September 3 — September 23, 1890.

Highways: Dedication: User: Obstructions.

1. In an action of trespass against town officers who had torn down a fence built by the plaintiff, the evidence — showing, among other things, that the fence was in a traveled road, and that the plaintiff had previously built other fences so located as to manifest an intention to dedicate the *locus in quo* as a public highway, and had allowed it to be used as such for many years — is *held* to sustain a verdict to the effect that the fence torn down was in a public highway which had become such by lawful user.
2. One of the questions submitted for a special verdict was, "Was any part of the fence which defendants pulled down in a public highway which had become such by lawful user?" *Held*, that there was no abuse of discretion in the wording of the question.
3. The public may acquire by user a right to more than the main traveled track of a road, especially where the owner of the land has manifested an intention to dedicate to the public a highway of the usual width.
4. An instruction to the jury that to constitute a valid dedication there must be an actual intent to dedicate, "of which the user by the public is evidence and no more, and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment," is *held* to have been properly refused.
5. A barbed-wire fence intentionally placed lengthwise in the traveled portion of a public highway is an obstruction within the meaning of sec. 1326, R. S., and may be removed as therein provided.

APPEAL from the Circuit Court for *Winnebago* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It is undisputed that at the time of the trial the plaintiff was the owner of the E. ½ of the S. W. ¼ of section 8, township 14, range 16, in Winnebago county, and had been for forty years; that the north line of his land was the south line of land owned by Silas M. Allen, and subsequently by

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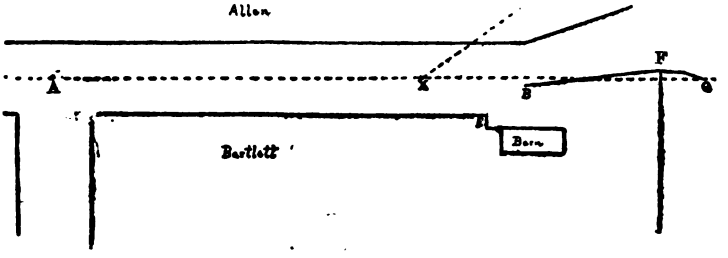
his son Timothy; that in 1849–50 a state road was laid out and opened from what is now Berlin to Neenah, which struck the west line of said section 8 at the quarter-post, and ran from thence east on the quarter-section line of said section to a point designated as X, and from thence northeasterly at an angle of about forty-five degrees, and ran on towards Neenah; that, twenty rods west of the point X, there commenced a public highway at a point designated as A, in the center of the state road, and ran from thence south, along the west line of *Bartlett's* land; that the portion of the state road from A to X was about sixty-three feet wide, of which about thirty feet was on *Bartlett's* land, and thirty-three feet on Allen's land; that travel on that portion of the state road which ran northeasterly from the point X was for a short distance abandoned, many



years ago, and instead thereof the travel continued directly east from the point X for a distance of about six rods, where the road fence on the north or Allen's side of the road, turned northeasterly; that upon the south side of said state road, and about thirty feet from said quarter-section line, and for a distance of twenty-three rods and twenty links east from the center of the road mentioned as running south, *Bartlett* maintained a substantial road fence, the east end of which was constructed of pickets, and terminated at a point designated as E; that from thence *Bartlett's* fence ran south a distance of ten feet, and from thence east a distance of ten or twelve feet, to the northwest cor-

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ner of his barn; that that barn was sixty feet long, east and west; that eighty-six feet and four inches east of the barn was *Bartlett's* east barn-yard fence, which ran from the south directly north to a point designated as F, five feet north of said quarter-section line, which point F was sixty-six feet from the road fence on the northwest side of the road; that from said point F in an easterly direction, for a distance of seventeen feet, and from thence in a south-easterly direction to a point in said quarter-section line designated as G, there was an old board fence wholly on Allen's land, said to have been put there by *Bartlett* in 1860; that the barn doors on the north side of Bartlett's barn were about twelve feet wide, and came to about twelve feet from the northwest corner of the barn, and about thirty-six feet from the northeast corner thereof; that in 1884 or in 1885, *Bartlett* built a barbed-wire fence from the point designated as F, at the north end of the barn-yard fence mentioned, westerly, and a little south of west, for a distance of 124½ feet, to a point designated as B, the same being five feet and four inches south of the quarter-section line, and only thirty-eight feet and four inches from the road fence on the north side of the road at that point; that sixty-five feet of the easterly end of that wire fence was on Allen's land, and only fifty-nine and one half feet of the westerly end of it was on *Bartlett's* land; that the point so designated B was directly north from said barn doors, and thirty-three feet therefrom; that said wire fence was torn down, October 27, 1887, by the defendants, acting as town supervisors and overseer of highways, for which this action of trespass was brought.

The defendants justify on the ground that the portion of said wire fence on *Bartlett's* land was an unlawful obstruction of said highway. The jury returned a special verdict to the effect that all of the wire fence on *Bartlett's* land so pulled down was in a public highway, which had become

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such by lawful user, and that if the plaintiff was entitled to recover they assessed his damages at $4.50. The court overruled the plaintiff's motion for a new trial, and ordered judgment for the defendants, with costs. From that judgment the plaintiff appeals.

For the appellant there was a brief by *Gary & Forward*, and oral argument by *C. H. Forward.*

For the respondents there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck.*

CASSODAY, J. A former judgment in this action was reversed for error. 74 Wis. 485.

The evidence as to the exact location of the fence in front of and northeasterly from *Bartlett's* barn prior to the construction of the wire fence in question is considerably mixed and conflicting. There is considerable evidence on the part of the plaintiff tending to prove that as early as 1862 or 1863, he built a board fence from a foot or so east of the barn door directly north to where the wire fence stood, and from thence easterly, on substantially the same line occupied by the wire fence, to the old board fence mentioned in the foregoing statement; that the fence so running north from the barn was not stationary, but was put up in the fall and taken down in the spring, and sometimes built of one kind of material and sometimes of another; that "sometimes it commenced at a post a few feet from the west corner of the barn, and ran northeast to the corner post of the barbed-wire fence" designated B in the foregoing statement; that for many years prior to the construction of the wire fence, *Bartlett* had maintained a fence of some kind on substantially the same line where the wire fence was located.

On the contrary, there is evidence on the part of the defendants tending to prove that such old fence started seven or eight feet east of the barn door and ran in a northeasterly direction until it reached the point designated F in the

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foregoing statement, or until it struck the west end of the old fence wholly on Allen's land, running westerly from said point F somewhere from twenty to thirty-five feet, and which was some fifty-five to sixty feet from the road fence on the northwest side of the road; that west of the fences last mentioned there was no fence between the barn and the traveled track of the highway prior to the construction of the wire fence; that while the main or regularly traveled track was always north of where the wire fence was located, yet that up to the time of such location there had from time to time been public travel over the whole of the land where that portion of the wire fence on *Bartlett's* land was located, and that this was especially true in the spring of the year, when the main traveled track was more or less muddy.

Such evidence, with the undisputed facts that the road in question was a part of the public highway from Winneconne to Neenah, and had been for forty years; that northeasterly from the point designated as F, as well as westerly from *Bartlett's* barn, this highway was regularly fenced out on both sides, so as to leave a space of from sixty-three to sixty-six feet wide for such public highway,—seems to be sufficient to sustain the verdict to the effect that the part of the wire fence on *Bartlett's* land pulled down by the defendants was in the public highway, which had become such by lawful user. It is to be remembered that the plaintiff expressly sanctioned the validity of all that part of the highway westerly from his barn, by constructing his road fence about thirty feet south of his north line, thus leaving the highway about four rods wide. The north side of his barn was so nearly in line with the road fence he so constructed as to obviate the necessity of any road fence north of it. Moreover, it is to be observed that a fence commencing seven or eight feet east of the barn door, and then running in a northeasterly direction, as testified to by

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witnesses on the part of the defense, and as manifestly found by the jury, would be about four rods from the road fence on the northerly side of the road. The fact that the plaintiff built that fence in that place and in that direction, as we must assume he did from the verdict, and the further fact that the northeasterly end of that fence was on Allen's land, and extended from there to the point designated as F, and from thence southeasterly to *Bartlett's* north line, at the point designated as G in the foregoing statement, seem to be sufficient to authorize the inference that in building such fences in such directions *Bartlett* intended to dedicate so much of his land to the public highway as was sufficient to make the same four rods wide, or thereabouts. It follows that the court properly refused to direct a verdict in favor of the plaintiff.

It remains to be determined whether there was any material error upon the trial. The learned counsel for the plaintiff excepts to the form of the question submitted to the jury in these words: "Was any part of the fence which the defendants pulled down in a public highway which had become such by lawful user?" The grounds of the exception are that it did not present the question in issue; that it called for a conclusion of law and not of facts, and was in effect a general verdict. We have often held that the form of the special verdict is very much in the discretion of the trial court. There does not appear to have been any abuse of discretion in the wording of this question.

The statutes prescribe that "all public highways now in use, heretofore laid out and established pursuant to law, and all roads not recorded which shall have been or shall be used and worked as public highways ten years or more, shall be deemed public highways, except" in certain cases, not here material. Sec. 1294, R. S. Of course this statute was in force for more than ten years prior to the alleged trespass. The court fully instructed the jury to the effect

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that, if the place where the alleged trespass was committed had not been used by the public uninterruptedly for any ten consecutive years prior to the alleged trespass, then it was not a highway; that, to constitute a valid dedication to the public, there must be an intention to dedicate by the owner, evidenced by the requisite public user; that a dedication by mere user is necessarily confined to the lands actually used, but is not necessarily limited to the main traveled path; that such dedication may be inferred to extend to the ordinary width of highways, unless such presumption is negatived by the fact of a fence or other obstruction which excluded the public therefrom; that the intention to dedicate may be inferred from the acts of the party and the surrounding circumstances as proven, including silence, omissions, or commissions on the part of *Bartlett.* Counsel cite this court to the proposition that "the dedication of a highway by user is necessarily confined to the lands actually used." *Valley P. & P. Co. v. West,* 58 Wis. 607. This is undoubtedly the rule where there is no other evidence of dedication but *mere user.* Thus it is said in a late and excellent work by Judge Elliott and his son that, "if the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user." Elliott, Roads & Streets, 136. The trial court, in effect, so charged, but said, in the same connection, that such dedication was not necessarily limited to the main traveled path. It may be that such charge was prejudicial to the defendants, since it is very manifest, from the facts stated, that this is not a case of dedication *solely by user.* It is undisputed that the plaintiff dedicated the south half of a portion of the road westerly from his barn by the building of his picket fence where he did. So the jury manifestly found that he built his fences northeasterly from his barn in such a way as to induce Allen to

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fence out the road four rods wide, where the same was wholly on his land. Counsel seem to think that such dedication was necessarily confined to the main traveled path, and they asked an instruction to the effect that such dedication was confined to such lands as had "been actually used by the public as a highway without interruption for ten years." If the words, "without interruption," apply only to the absence of some barrier or obstruction to travel, then the court, in effect, so instructed. If they imply that such user must have been continuous, or that every traveler upon the highway passed over the very land where the wire fence was located, then it was not good law, and was properly rejected, especially since there was here something more than mere user. Most country roads have a narrow beaten track, but it does not follow that the use is confined to such path. Teams must pass each other, and for that purpose must necessarily depart from the main traveled track. So when such track is muddy, public convenience requires departures from such track. We cannot hold that the public can acquire no legal right to such sides of the main traveled track by such ordinary user. On the contrary, it is held by courts of high authority that "where a highway is established by user merely over a tract of land of the usual width of a highway, the right of the public is not limited to the traveled path, but such user is evidence of a right in the public to use the whole tract as a highway by widening the traveled path, or otherwise, as the increased travel and the exigencies of the public may require." *Sprague v. Waite*, 17 Pick. 309; *Hannum v. Belchertown*, 19 Pick. 311; *Simmons v. Cornell*, 1 R. I. 519; *Cleveland v. Cleveland*, 12 Wend. 172. Under the charge of the court the jury were required to find for the plaintiff, unless they found that the part of the fence pulled down stood upon land which had become a public highway by ten years' actual user. This more than covered the request of the plaint-

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iff to charge, in effect, that there was no presumption that a highway established by user was four rods wide, or of any particular width, and hence there was no error in refusing such request.

Several of the instructions requested were either given in substance in the general charge or inapplicable to the evidence, or related to matters admitted or conceded by all and hence not controverted, and therefore properly rejected.

The learned counsel for the plaintiff excepts to the refusal of the court to give an instruction in the language of an English judge, quoted by Cole, J., in *Tupper v. Huson*, 46 Wis. 649, to the effect that there must be an actual intent to dedicate, "of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment." The instruction was not strictly applicable to the case, and if it were it is doubtful whether the court should have charged that every act of such interruption should have such effect as a matter of law. Many temporary interruptions may be imagined, when there would be no intention to obstruct. Besides, it may be questionable whether the proposition is strictly accurate. In the recent work of Judge Elliott mentioned it is said: "If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose. If the open and known acts are of such a character as to induce the belief that the owner intended to dedicate the way to public use, and the public and individuals act upon such conduct, proceed as if there had been in fact a dedication, and acquire rights which

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would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent." Elliott, Roads & Streets, 92. We cannot say that the refusal to instruct as requested was error.

The defense was based upon both dedication and prescription, and there is sufficient evidence in the case to support the defense on both grounds. The use by the public for the requisite period, in the absence of proof to the contrary, must be presumed to have been under claim of right, without proof of any act of the town authorities upon the particular land in dispute. *Hart v. Red Cedar*, 63 Wis. 639. A public highway, established by dedication or prescription or both, stands in law upon the same footing as one that has been legally laid out. *West Bend v. Mann*, 59 Wis. 69. It follows that whoever obstructs any highway so established by dedication or prescription or both, subjects himself to the forfeiture prescribed by sec. 1326, R. S. A barbed-wire fence intentionally placed nearly lengthwise the traveled portion of a public highway is certainly an obstruction, within the meaning of that section. *State v. Leaver*, 62 Wis. 387; *Pauer v. Albrecht*, 72 Wis. 416. It is much more than a mere encroachment, within the meaning of sec. 1330, R. S. We find no material error in the record.

By the Court.— The judgment of the circuit court is affirmed.

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IN RE THE OSHKOSH MUTUAL FIRE INSURANCE COMPANY.

September 3 — September 23, 1890.

Insurance companies: Insolvency: Injunction: Receivers: Dissolution.

1. Under secs. 3218, 3219, R. S., a creditor or stockholder of an insolvent insurance corporation may maintain an action to restrain the exercise of its corporate rights, etc., for the appointment of a receiver, and to close up the business of the corporation.
2. The fact that a dissolution of the corporation is prayed for in such action does not impair the jurisdiction of the court to grant the relief authorized by said sections.
3. Such an action having been commenced and an injunction granted and a receiver appointed, an application by the attorney general for an order that the corporation show cause why its business should not be closed and a receiver appointed was properly denied. The attorney general might become a party to the pending action and ask therein for a dissolution of the corporation, which might then be granted, and all the ends sought might thus be attained without another independent proceeding.

APPEAL from the Circuit Court for *Winnebago* County.

The appeal is from an order denying an application by the attorney general for an order that the *Oshkosh Mutual Fire Insurance Company* show cause why its business should not be closed and a receiver appointed for that purpose. An action had previously been commenced by R. McMillen and others, officers and directors of said company, for a dissolution of the company, an injunction, the appointment of a receiver, etc. Other facts will appear from the opinion.

For the appellant there was a brief signed by *Hicks, Phillips & Kleist*, attorneys for creditors, and by the *Attorney General*, and the cause was argued orally by *M. C. Phillips* and *Geo. E. Sutherland.*

For the respondent *C. W. Davis*, receiver of the company, there was a brief by *Finch & Barber*, and oral argument by *Charles Barber* and *Charles W. Felker.*

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COLE, C. J. It is claimed on the part of the appellant that the action instituted by R. McMillen and others, officers and board of directors of the respondent, and all the proceedings therein, were unauthorized and void. Is that position sound? That action was brought to adjust, settle, and wind up the business of the corporation. The plaintiffs ask for an injunction, and the appointment of a receiver to take charge of the property of the corporation, convert its assets into money, collect its debts, and close out its affairs under the direction of the court. A dissolution of the corporation is asked for. From the complaint and the amendment to the same, which we understand was allowed before the application of the attorney general was heard, it appears that in that case the plaintiffs were stockholders and creditors of the defendant. It also appears from the complaint that the defendant was insolvent and unable to pay its debts, though that fact was questioned on the argument. But, without dwelling on the point, we must say that we can reach no other conclusion upon the matters set forth than that the corporation was in a failing condition and was unable to meet its just debts. This, in brief, being the case presented, is it correct to say that the suit thus instituted by the officers and directors of the corporation for the purpose intended was entirely unauthorized by our statutes, and that all the proceedings taken thereunder were void?

It seems to us that no such position is tenable or correct. It is true the defendant professes to be a mutual insurance company, and, it is said, is governed by different rules than those which are applicable to strictly stock companies. But it is undeniable that it is a corporation authorized by law and organized to make contracts of insurance. The complaint filed by its officers shows that it had become insolvent or was unable to pay its debts. Now, sec. 3218, R. S., provides, in substance, whenever any corporation having

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banking powers, or authorized by law to make insurance, shall become insolvent or unable to pay its debts, or shall neglect or refuse to pay its notes or evidences of debt on demand, or shall have violated any of the provisions of its act of incorporation or any law binding on such a corporation, any court having jurisdiction may by injunction restrain such corporation and its officers from exercising any of its corporate rights and privileges or franchises, and from collecting or receiving any debts or demands, and from paying out or in any way transferring or delivering to any person any of the money, property, or effects of such corporation, until such court shall otherwise order. The next following section provides that the injunction may be issued upon the commencement of an action for the purpose of closing up the business of such corporation by the attorney general in the name of the state, or by any creditor or stockholder of such corporation, or at any time thereafter upon proof of the facts required to authorize the issuing of the same. Sec. 3219, R. S. The court may, in any stage of such action, appoint one or more receivers to take charge of the property and effects of such corporation, to collect its debts and discharge the duties imposed upon receivers in other cases, subject to the control of the court.

Here, as it appears to us, is ample power given the court to take jurisdiction of the cause, grant writs of injunction, and appoint receivers at the suit of a creditor or stockholder, and close the business of the corporation. But it is said the court in such a suit will have no power to decree a dissolution of the corporation. But this objection does not go to the jurisdiction of the court to proceed with the cause as far as authorized by the statute. Because the court cannot grant all the relief asked it does not follow that it has no jurisdiction to grant any relief. Indeed, it seems almost too plain for argument, in view of the provisions above cited, that the suit of McMillen and others against the de-

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fendant corporation was one authorized to be brought, and that the proceedings in that action are not void, even if irregularities in the same have intervened. Whether the complaint in the action or facts proven justify the appointment of a receiver, is a question not before us. We have merely referred to the case to show that the court had jurisdiction of it, and had power to appoint a receiver in it on a proper case, and that the action was still pending.

At this stage of that cause, the attorney general obtained an order from the circuit court directing the defendant to show cause why its business should not be closed, and that a receiver be appointed to take charge of its assets for the purpose of winding up its affairs. The application was made under sec. 1968, R. S., which authorizes the attorney general, when informed by the commissioner of insurance that he is satisfied, from an examination, that the assets of an insurance corporation are insufficient to justify its continuance in business, to apply to the circuit court of the county where the principal office of the corporation is located for an order requiring it to show cause why its business should not be closed. The attorney general bases his application for the order to show cause upon various exhibits, among which are the records and files in the case of McMillen and others against the defendant, which we have alluded to. On the hearing the court denied the application, and from that order this appeal is taken.

It does not appear upon what ground or for what reason the court below denied the application, nor is it very material to know. We think it was properly denied, because the suit by the attorney general was unnecessary. The attorney general might become a party to the pending action of McMillen and others against the defendant, and in that suit accomplish all the ends which could be attained in an independent action brought by him in the name of the state. What was the necessity of any other suit? Differ-

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ent suits brought to secure the same ends are always considered objectionable. It would be especially so in this litigation to have different receivers appointed to take charge of the same estate, dispute and wrangle over its control, disposition, and management, and increase the expense and costs of settling it for no useful purpose whatever. Confusion and conflict would inevitably arise between the receivers in the transaction and adjustment of the affairs of the corporation, and this is to be avoided if possible.

But it is said there can be no decree dissolving the corporation in the pending action, which is desired. But if the attorney general becomes a party to this suit, such a dissolution could be decreed, if consistent with the facts proven and the principles of equity. It will be noticed that the attorney general does not ask in his application that the court decree a dissolution of the corporation, but that the business of the company be closed. But still, in such a case, the court is expressly authorized, if it finds that the assets and funds of the corporation are insufficient, and the interests of the public so require, to decree a dissolution of the corporation. Sec. 1968, R. S. But the same relief may be granted in the pending action if the attorney general asks for it in the name of the state.

So, in any possible view which we have been able to take of the question, we see no necessity for the attorney general instituting another independent suit to close up the business of the corporation, and settle and adjust its affairs. Besides, it appears that an injunction has been granted in the pending suit, restraining the corporation from carrying on the business of insurance, and a receiver has been appointed, who has employed attorneys under the authority of the court, and who has proceeded to collect assessments and enforce claims, and much of this expense and labor might go for naught if the application of the attorney general were granted. And, as we cannot see that the public interests or the rights of any party concerned will be in any way

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promoted or subserved by instituting such a suit, when there is no obstacle to the attorney general's becoming a party to the pending action, and litigating all matters in that action which are undetermined, we think the order of the circuit court should be affirmed.

By the Court.— It is so ordered.

WINCHELL, Respondent, vs. ABBOT and another, Trustees, Appellants.

September 3 — September 23, 1890.

Railroads: Injury to person at sidewalk crossing: Contributory negligence: Failure to look and listen: Court and jury: Absence of flagman: Special verdict: Judgment.

1. The plaintiff was struck and injured by defendants' locomotive on a sidewalk crossing in a thickly settled portion of a city. It was in the night-time and the locomotive had come down the street behind her, going in the same direction. The track curved sharply just before crossing the sidewalk, which was planked continuously on a level with the tops of the rails. The testimony tended to show, among other things, that the plaintiff was not familiar with the locality and did not know the precise position of the crossing; that trees and telegraph poles between the track and the sidewalk obscured, to some extent, her view of the track; and that, because of the curve, the light from the head-light did not fall directly upon her until the locomotive was very near the crossing. *Held* that, notwithstanding a special finding that if the plaintiff had looked before attempting to cross the track she could have seen the light from the head-light, it was still a question for the jury whether she was guilty of any contributory negligence.
2. No weight can be given to a finding in the special verdict that the defendants' failure to have a light or a flagman at the crossing, to warn the plaintiff of the approaching locomotive, was negligence. The jury was not competent to determine that proposition.
3. But, the defendants' negligence in failing to provide proper means for securing the safety of persons at the crossing being conclusively established, the court should base its judgment upon the existence of such negligence, although there is no valid finding to that effect in the special verdict.

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APPEAL from the Circuit Court for *Winnebago* County.

On December 17, 1888, at about 8 o'clock in the evening, the plaintiff was run against and injured by a locomotive engine on a railroad in the city of Oshkosh, operated by the defendants as trustees. She brought this action to recover damages for such injury.

The defendants' railroad extends through the city of Oshkosh, north and south. It enters Division street from the north, at the north end of the street, probably half a mile or more north of the place of the accident, and runs south along the street nearly to the point where plaintiff was injured. It then curves to the east entirely across the street and east sidewalk thereof. It crosses the sidewalk at an angle so acute that from the point where the east rail of the track intersects the sidewalk to where the west rail leaves it is fifty-two feet. The crossing is all planked, making a continuous sidewalk level with the tops of the rails, with no break except a groove, perhaps an inch and a half wide, inside each rail for the flanges of the engine and car wheels to run in.

Immediately before the accident, plaintiff came west on Polk street (which is the last street crossed by the track before it so curves east) to Division street, and turned down that street on the east sidewalk thereof, going in the direction of her home. She had a bundle on one arm and a basket on the other. The contents of these were clothing she had received from a customer and was taking to her own home to wash — she being a laundress. She estimated the weight of these two packages at about forty pounds. When on the crossing, she was struck by a passing locomotive, which she did not see until she was struck, and received the injury complained of. The crossing is in a thickly settled portion of the city, near the business center thereof.

The jury returned a special verdict, which is as follows: "(1) Were the defendants or their employees guilty of neg-

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ligence that caused the injury to the plaintiff? Answer. Yes. (2) If you answer the foregoing question 'Yes,' state in what the negligence consisted. A. In not having a light or flagman to warn people there was danger. (3) Was the plaintiff guilty of want of ordinary care or prudence that contributed to the injury? A. No. (4) Could the engineer or fireman have seen the plaintiff before the locomotive turned on the curve? A. No. (5) Immediately preceding the accident when the plaintiff was injured, was the bell being continuously rung as the train passed down Division street? A. Yes. (6) At what rate of speed was the train running when the plaintiff was struck and injured? A. Six miles. (7) Had the plaintiff, before she attempted to go across the crossing, looked, could she have seen the light from the head-light of the locomotive? A. Yes. (8) When the plaintiff was struck by the cow-catcher of the locomotive, was she upon the crossing, or upon the railway track of the defendants south of the crossing? A. On the crossing. (Ninth question immaterial, and not answered.) (10) If the plaintiff is entitled to judgment, at what sum do you assess her damages? A. $1,100." A motion by the defendants for a new trial was denied, and judgment for the plaintiff entered pursuant to the verdict, from which judgment the defendants appeal.

For the appellants there was a brief signed by *Charles W. Felker*, attorney, and *Howard Morris*, of counsel, and oral argument by *Mr. Felker*.

For the respondent there was a brief by *Eaton & Weed*, and oral argument by *M. H. Eaton*.

Lyon, J. The only question argued by counsel, and the only one to be determined on this appeal, is, Does the special verdict support the judgment for the plaintiff? It is maintained by counsel for defendants that it fails to do so, because (1) it establishes the fact that the plaintiff was

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guilty of negligence which contributed directly to the injury she received; and (2) it demonstrates that the defendants exercised reasonable care and diligence to avoid the injury.

1. The first proposition is based upon the answer to the seventh question in the special verdict, which is that, had the plaintiff looked before she attempted to cross the railroad track, she could have seen the light from the headlight of the locomotive which ran against her. But the testimony tends to show that, because of the curve in the track (which defendant's engineer testified is a sharp one), such light did not fall directly upon the plaintiff until the locomotive was very near the crossing. Also that there were trees and telegraph poles between the track and sidewalk, which to some extent obscured her view of the track nearly to the crossing. It also tends to show that the plaintiff was not familiar with that portion of Division street. She had been there but a few times since the railroad was constructed, and not at all for two or three years before she was injured. She knew the railroad crossed the sidewalk in that vicinity, but did not know the precise location of the crossing. Considering these circumstances, and, further, that the injury was inflicted at night and probably immediately after the plaintiff reached the track — presumably before she had time to realize the peril of her situation, or comprehend what she should do to avoid it,— it seems very clear that the question of her negligence, notwithstanding the seventh finding in the special verdict, was still a question of fact for the jury, and that they might properly find from the testimony that the case is an exception to the general rule that a person approaching a railroad crossing must look and listen for trains,— stopping for that purpose under some circumstances,— before he attempts to cross, or he is negligent. See *Phillips v. M. & N. R. Co.*, *ante*, p. 349. We conclude, therefore, that the finding which acquits the

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plaintiff of negligence contributing to her injury is supported by the testimony and should not be disturbed.

2. In running its locomotive across the sidewalk, did the defendants, under all the circumstances of the case, exercise proper care to avoid injuring the plaintiff? It is settled by the special verdict that the locomotive was running at the rate of six miles an hour, and the bell thereon was being rung continuously before and while crossing the sidewalk. This was a compliance with the requirements of the statute in those particulars. R. S. sec. 1809. It is quite evident that neither the fireman nor engineer could have seen the plaintiff on the sidewalk before the locomotive turned the curve, for the light from the head-light did not fall upon her, and after that time it was doubtless impossible to stop the engine before crossing the sidewalk. Hence, if any fact is found in the special verdict which charges the defendants with negligence, it is their failure to have at the crossing a light or flagman to warn the plaintiff of the approach of the locomotive. The jury found that such failure was negligence. On the authority of *Heddles v. C. & N. W. R. Co.* 74 Wis. 239, which is in accord with the great weight of authority elsewhere, the jury were not competent to determine that proposition. Many of the adjudications on the subject are referred to by Mr. Justice CASSODAY in the opinion in that case. True, in *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375, it is suggested in the opinion by Mr. Justice ORTON that the question of the obligation of a railway company to observe such extraordinary precautions in very dangerous places may be for the jury; but, after a thorough examination of the subject in the *Heddles Case*, we all reached the conclusion that the question cannot properly be submitted to the jury. The rule adopted in the latter case is clearly stated in an extract there made from the opinion by FINCH, J., in *Houghkirk v. D. & H. Canal Co.* 92 N. Y. 219, which will bear

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repetition here. It is as follows: "The fact [of the presence or absence of a flagman] may be proven as one of the circumstances under which the train was moved, and by which the degree of care requisite in its handling and running may be affected, so that the question never is whether there should have been a flagman, or one ought to have been stationed at the crossing, but whether, in view of his presence or absence, the train was moved with prudence or negligence." Although, in the above case, the question related only to the employment of a flagman, yet, manifestly, the same rule applies to any case in which it is claimed the railway company ought to maintain, at highway crossings, any extraordinary precautions, not specially required by statute, for the protection of travelers on such highways.

It follows that no weight can properly be given to the finding that the failure of defendants to have a light or flagman at the sidewalk crossing, to warn plaintiff of the approach of the locomotive, is negligence; but there still remains a finding that such failure caused the injury to the plaintiff. Such is the obvious effect of the first and second findings in the special verdict, considered together; that is to say, the jury found therein two facts: (1) That the failure to have at the crossing either a light or flagman to warn plaintiff of her danger caused the injury complained of; and (2) that such failure was negligence. The jury were competent to determine the first proposition; hence the fact thus found is a verity in the case. The finding of the other proposition is, as we have seen, ineffectual for any purpose. Hence, there is no sufficient authorized finding in the special verdict that the defendants were guilty of negligence which caused the injury.

But there is another feature of the case which, in our opinion, supplies the defect in the verdict. The undisputed evidence proves that the sidewalk crossing was a peculiarly dangerous one, especially to the plaintiff, who, burdened

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with packages, was passing over it in the darkness of the evening, going in the same direction with the locomotive, without any accurate knowledge of the exact location of the track. Her only protection from injury was the watchfulness of the engineer and fireman on the locomotive, and, by reason of the trees, telegraph poles, and curve in the track, their vigilance was entirely inadequate to protect her. It is clear that, in view of these conditions, it was the duty of the defendants to provide some other means to secure her safety. Because they failed to do so the plaintiff was injured, for it is a verity in the case that she was in the exercise of proper care. Such failure is negligence, and, the negligence being conclusively established, the court properly may, and should, base its judgment upon the existence thereof, although there is no valid finding to that effect in the special verdict. Such is the rule in this state firmly established by many adjudications of this court.

In the *Heddles Case* it was not conclusively proved that it was the duty of the railway company to provide any additional precautions for the safety of travelers on the crossing. This fact distinguishes that from the present case. The jury found that the absence of a light or flagman on the crossing caused the injury complained of. These were probably named because they are the usual appliances in such cases. Doubtless the use of other precautions instead, equivalent to these, would fulfil all legal requirements.

By the Court.—The judgment of the circuit court is affirmed.

Cassoday, J. The finding of the jury as to the defendants' negligence should be construed and considered in connection with all the undisputed facts and circumstances in the case. *Stilling v. Thorp*, 54 Wis. 536, 537. When so construed and considered, the finding of the defendants' negligence seems to be sustained. The mere fact that one

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of the findings is to the effect that the defendants' negligence consisted in the absence of a light or flagman did not destroy the force of the other undisputed facts and circumstances as evidence; and hence the finding of the defendants' negligence is sustained by the evidence, and the judgment is properly affirmed.

BLEWETT and another, Respondents, vs. GAYNOR, Appellant.

September 4 — September 23, 1890.

(1) Pleading: Account stated: Payment: Burden of proof. (2, 3) Partnership: Settlement by one partner: Evidence: Judgment. (4) Opening case for further evidence: Discretion.

1. In an action to recover a balance alleged to be due upon a contract for logging, where the defendant admitted that the amount of work done and the agreed price therefor were as alleged, but pleaded payment in full, an allegation of the complaint that an accounting had been had and a balance found due the plaintiffs, which the defendant agreed to pay, is *held* to be merely an admission of part payment and not to make the action one solely upon an account stated. The burden was therefore upon the defendant to prove payment in full, and not upon the plaintiffs to prove the accounting.
2. The evidence in this case — showing, among other things, that one of the plaintiffs testified there had been no settlement in full of the claims in suit, and that the other plaintiff, his partner, who was clearly in the interest and to a considerable extent under the control of the defendant, testified that he had made such a settlement with the defendant and given a receipt in full (which was not produced), but was unable or unwilling to state what claims were allowed in such settlement on either side — is *held* to sustain a finding of the trial court that no settlement in full had been made.
3. The respective interests of the plaintiffs, as between themselves, in the claims in suit not being shown by the evidence, the fact that one of them testified that such claims had been settled does not limit the judgment to one half of the amount thereof.
4. A motion to have a case reopened, after a referee has reported, for the receipt of further testimony is one peculiarly addressed to the discretion of the trial judge, and his determination is conclusive unless it clearly appears that injustice will be done thereby.

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APPEAL from the Circuit Court for *Winnebago* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action was commenced originally by *Edmund Blewett* against *James Gaynor* to recover for the sum claimed to be due *Blewett* from said *Gaynor* upon a written contract signed by the said *Blewett* and *Gaynor* for cutting and putting in the river a large quantity of pine logs in the winters of 1883–4 and of 1884–5. After this action was commenced the defendant claimed that the contract was in fact made by *Blewett* and *Patrick Gaynor*, a brother of *James Gaynor*, of the one part, and himself of the other part; and thereupon such proceedings were had in the action that the said *Patrick Gaynor* was made a co-plaintiff with *Blewett;* and for the purposes of this action and of this appeal the said plaintiffs, *Blewett* and *Patrick Gaynor*, must be considered as the joint makers of the contract sued upon, and the money, if any, due upon said contract must be considered as due to the plaintiffs jointly.

The complaint sets up two causes of action,— one for the balances claimed to be due for cutting and putting in logs in the winter of 1883–4, and in the winter of 1884–5; and a second cause of action to recover damages of the defendant for preventing the plaintiffs from cutting and putting in other logs in the winter of 1884–5. This second cause of action is not involved in this appeal, as the trial court found against the plaintiffs as to that cause of action, and no appeal is taken by the plaintiffs from the judgment rendered in the action. The following is a copy of the contract upon which the action is brought, omitting the descriptions of the lands from which the logs were to be cut:

"This agreement, made and entered into this —— day of November, 1883, by and between *Patrick Gaynor*, of Chippewa Falls, Wisconsin, and *Edmund Blewett*, of the town of Oakfield, county of Fond du Lac, Wisconsin, parties

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of the first part, and *James Gaynor*, of the city and county of Fond du Lac, Wisconsin, party of the second part, witnesseth: That the parties of the first part, for and in consideration of the payments and covenants hereinafter set forth, to be made and performed by the party of the second part, hereby agree, during the winters of 1883–4, 1884–5, 1885–6, 1886–7, to cut and put into the Burnette and main Chippewa rivers all the timber belonging to the party of the second part on all the lands hereinafter described; that they, the parties of the first part, agree that they will put in no other timber than that belonging to the party of the second part during said seasons. And the party of the second part hereby agrees to pay to the parties of the first part for all of said timber so cut and so put in from the following described lands, to wit [describing them], $3.50 per 1,000 feet, and for all of said timber so cut and so put in from the following described lands, to wit [describing them], at the rate of $4 per 1,000 feet; the timber upon the last-named lands to be estimated and agreed upon before being cut, and paid for on such estimate.

"And the said party of the second part agrees to pay during each winter of said years — that is, on the 15th days of January, February, and March — two dollars per thousand feet on the quantity of timber cut and put in at such times, and, on the closing of the season, when the camp shall be broken up, fifty cents per thousand feet on all the timber cut and put in up to that time; that is, $2.50 in all per thousand on all timber cut and put in. The balance due on the cut of each winter to be paid for in equal instalments on the 1st day each of June, July, August, and September, in each of the years 1884, 1885, 1886, and 1887.

[Signed] "EDMUND BLEWETT. [Seal.]
"JAMES GAYNOR. [Seal.]

"In presence of W. A. ELDREDGE."

The plaintiffs in their complaint allege, after setting out

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the contract between the parties, as above stated, "that, under and in pursuance thereof and in performance of his undertaking therein, they cut and put into the said rivers parcel of the pine growing upon the said descriptions of land first above recited, and for which the defendant agreed to pay the sum of $3.50 per thousand feet as aforesaid, during the logging season of the years 1883 and 1884, a large quantity of logs, to wit, 7,818,160 feet, and thereafter, on the 12th day of September, 1884, these plaintiffs and the defendant had an accounting of and concerning the quantity of lumber cut by these plaintiffs under said contract during said winter of 1883–4, and of the payment made by the defendant thereon, and there was then and there found to be due and in arrears from the defendant to these plaintiffs the sum on such contract for such logging so done as aforesaid by these plaintiffs the sum of $3,087.07, with interest from the 1st days of June, July, August, and September, 1884, upon such proportion of the balance as became due and payable on said days respectively, that is to say, an equal one-fourth thereof. And the said defendant did then and there undertake and promise to pay the same to these plaintiffs; but, although often requested, he has not paid the same, nor any part thereof. And afterwards, in the winter of 1884–5, these plaintiffs, in further performance and fulfillment of the said contract on their part, off from the said lands first above described as aforesaid, in the $3.50 per thousand class, cut and put in a large quantity of said logs, to wit, 2,441,890 feet, and the said defendant has advanced and paid thereon, under said contract, the sum of $5,102.28 and no more, leaving remaining due and unpaid the sum of $3,444.33, with interest on an equal one-fourth part thereof from the 1st day of each of the months of June, July, August, and September, in the year 1885, and to pay the same or any part thereof the said defendant has wholly neglected and refused; but, on the contrary, here-

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tofore, on or about the 20th day of June, 1885, the said defendant set up and pretended, and still pretends, that the sum so by him paid as last aforesaid, was in full for all the lumber cut and put in in the winter of 1884–5,—all of which is untrue.

To this complaint the defendant answered, admitting the making of the contract as set out in the complaint, and admitting that under said contract, during the logging season of 1883–4, the plaintiffs cut 7,818,160 feet, and during the season of 1884–5, 2,441,610 feet, but no more. The answer then further alleges "that for the cutting and hauling of the said timber during both of said seasons the defendant has fully paid the plaintiffs; that after the close of the logging season of 1884–5, the defendant had an accounting with the plaintiffs, and a full and complete settlement and adjustment of all matter and transactions arising from or growing out of said logging contract; and that at that time the defendant paid to the plaintiffs the full and complete balance found upon such settlement to be their due. And the defendant here pleads and alleges payment in full of the plaintiffs' demands under and by virtue of said contract. The defendant further alleges and charges the fact to be that the plaintiff *Edmund Blewett* is now prosecuting this action in the name of himself and *Patrick Gaynor*, plaintiffs, against the wishes and consent of said *Patrick Gaynor*, and that as a matter of fact said *Blewett* has himself received, as the proceeds of the logging business conducted by the plaintiffs during the two logging seasons,—1883–4 and 1884–5,—more than the entire profits of the said logging business for the said two logging seasons; that a true and correct statement, as this defendant is informed and verily believes, of the moneys received and appropriated by said *Blewett* out of this defendant's payments on said logging contracts, and out of the moneys either paid directly by this defendant to said *Blewett* or paid for him and by

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him credited and allowed on said contract, is hereunto annexed, marked 'Exhibit B,' and made a part of this answer. The defendant in further answering says that a true and correct statement of the moneys paid by this defendant, or paid for him, to the plaintiffs for the cutting and hauling of logs by the plaintiffs during said two logging seasons is hereunto annexed, marked 'Exhibit C,' and made a part of this answer; that said Exhibit C also contains a true and correct statement of other sums of money properly and justly applicable upon the said logging contract, and which statement shows that the plaintiffs are properly and justly chargeable with a sum largely in excess of the amounts they actually earned under said contract. The defendant, for a further answer to both causes of action set out in the plaintiffs' amended complaint, denies each and every allegation of said complaint, and every matter and thing therein contained, except as herein admitted, qualified, or explained."

The remainder of the answer sets up several counterclaims, in regard to which no evidence was given on the trial, and which were before judgment withdrawn from the consideration of the court. The case must therefore be determined upon the pleadings above set forth, and upon the testimony of the plaintiffs, who were both called by the plaintiffs and testified in the case. The defendant offered no witnesses to sustain the allegations of his answer, but relies solely upon the statements made by the plaintiff *Patrick Gaynor*, who was examined by the plaintiffs and cross-examined by the defendant.

The case was referred to a referee to hear, try, and determine the same. Upon the pleadings and evidence offered by the plaintiffs the referee decided that there was sufficient evidence to show a settlement and full payment of the plaintiffs' claims before the commencement of the action, and he rendered a judgment in favor of the defendant, dismissing the complaint with costs.

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Upon the report of the referee, and all the evidence and proceedings in the action, the plaintiffs moved the court that the referee's report be altered and modified by setting aside and reversing the findings of fact and conclusions of law, and for judgment in favor of the plaintiffs for the sum of $6,531.40, with interest on the sum of $3,087.07 from September 1, 1884, and interest on the sum of $3,444.33 from September 1, 1885. Upon the hearing of this motion the learned circuit judge set aside the findings and judgment of the referee, and made the following findings of fact and conclusions of law, viz.: "(1) That during the month of November, 1883, the plaintiffs entered into a contract with the defendant for cutting and putting into the Burnette and main Chippewa rivers certain timber upon lands belonging to the defendant, for the sum of $3.50 per M., as more particularly appears by the written contract entered into between the parties, a copy of which is annexed to the amended answer herein; (2) that under and in pursuance of said contract the plaintiffs cut and put in, during the logging season of 1883 and 1884, 7,818,160 feet of logs from said timber of the defendant at the price aforesaid, and that under said contract, during the logging season of the years 1884–5, the said plaintiffs put in for the defendant 2,441,890 feet of logs from said timber of the defendant at said price; (3) that upon the amount thus earned by the plaintiffs in cutting and putting in logs during said logging season of 1883–4, the defendant paid the plaintiffs divers sums of money, so that the balance, as admitted by the plaintiffs' amended complaint, at the time of the commencement of the action was the sum of $3,000; (4) that upon the amount earned by the plaintiffs in cutting and putting in logs as aforesaid during the logging season of 1884–5 the defendant paid to the plaintiffs divers sums, admitted in said amended complaint, so that the balance for said last season's work, as claimed by the plaintiffs in said amended

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complaint, was the sum of $3,444.33; that in addition to said payment on said second season's work, admitted by said complaint, the defendant paid to the plaintiff *Patrick Gaynor* thereon, some time during the year 1885, the sum of $500; (5) that no other payments upon or for any of said work were ever made by the defendant, as disclosed by the pleadings and the evidence; (6) that no evidence was offered by the defendant in support of any of the counterclaims of his answer; (7) that in and by the terms of the contract aforesaid all of the balance due for the logs cut and put in thereunder during the season of 1883–4 became due on or prior to September 1, 1884, and all of the balance due for logs put in by the plaintiffs during the season of 1884–5 under said contract, became due on or prior to September 1, 1885; (8) that the allegations of the plaintiffs' second cause of action are not sustained by the evidence."

And as conclusions of law therefrom the court finds "(1) that no settlement for said work and earnings of the plaintiffs under said contract was ever had between the parties, and no payment or satisfaction thereof made, except to the extent recited in the foregoing findings of fact; (2) that the plaintiffs are entitled to judgment against the defendant in the sum of $5,944.33, and interest on the sum of $3,000 from the 1st day of September, 1884, and interest on the sum of $2,944.33 from the 1st day of September, 1885, together with the costs of this action. It is therefore ordered by the court now here that the motion of the defendant to confirm the report of said referee and for judgment thereon, be, and the same hereby is, in all things denied. And it is further ordered that the motion of the plaintiffs to alter and modify said referee's report and for judgment thereon be, and the same hereby is, granted, and judgment is hereby ordered and directed in favor of the plaintiffs and against the defendant for the sum of $5,944.33, and interest on the sum of $3,000 from the 1st day of Sep-

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tember, 1884, and interest on the sum of $2,944.33 from the 1st day of September, 1885, together with costs of this action."

Upon these findings judgment was rendered in favor of the plaintiffs against the defendant for the sum of $8,061.45 damages, and $53.08 costs. The defendant duly excepted to the findings of fact and conclusions of law made by the court. The defendant, before final judgment was entered, also moved the court to permit him to give further evidence on his part to sustain his defense. This motion was overruled and exception taken.

Geo. E. Sutherland, for the appellant.

For the respondents there was a brief by *T. W. Spence*, of counsel, and the cause was argued orally by *Mr. Spence* and *E. S. Bragg*.

TAYLOR, J. Upon this appeal the learned counsel for the defendant insists that the court erred in setting aside the findings and judgment of the referee, and in finding in favor of the plaintiffs and rendering judgment in their favor. They also allege as error the refusal of the court to permit the defendant to give further evidence in support of his defense, after the court had set aside the findings and judgment of the referee.

In order to intelligently consider the justice of the judgment in this case, it is necessary first to understand what is admitted by the pleadings in the case. After a careful consideration of the complaint of the plaintiffs and the answer of the defendant as to the plaintiffs' cause of action for cutting and hauling the logs in question under the contract, it is evident that, in the absence of any evidence on the part of either the plaintiffs or defendant, the plaintiffs would have been entitled to judgment for the sum of $3,087.07 as the balance due for the logs cut and put in in 1883–4, and for the further sum of $3,444.33 as the balance due for putting

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in the logs in 1884–5. Possibly the value of putting in 280 feet should be deducted from this last sum, as the defendant does not admit the cutting and putting in this amount claimed by the plaintiffs. Plaintiffs claim 2,441,890 feet, and the defendant admits but 2,441,610 feet. This variation is too inconsiderable to affect the judgment in the case. Upon the pleadings the case stands in this condition: The plaintiffs allege the cutting and putting in of logs under the contract in both seasons to the amount of 10,258,050 feet at $3.50 per thousand, amounting in all to the sum of something over $35,500 due the plaintiffs by the terms of the contract for the work done, and the plaintiffs admit it has all been paid for except as to the sum of about $6,530. The defendant admits the amount of work done, and the contract price, and further claims that he has paid the whole amount due for the plaintiffs' work under the contract. In this state of the pleadings it seems to us very clear that the burden of proof is on the defendant to show that he has paid the plaintiffs' claim in full, or else judgment must go against him for the amount which he fails to show has been paid, not exceeding the amount claimed to be due by the plaintiffs.

This proposition is not contended against as to the amount claimed to be due for the second winter's work, but the counsel for defendant maintains that, because the plaintiffs allege in their complaint that as to the work done in the season of 1883–4 there was an accounting and a balance agreed upon, which the defendant promised to pay, the plaintiffs must prove such an accounting and settlement in order to recover the amount claimed as due for that year's work. We cannot take this view of this pleading. The facts stated in that part of the complaint show the amount of money due to the plaintiffs for the first winter's work to be over $27,000, and the statement as to the accounting simply amounts to an admission that it has all been paid

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except the sum stated as remaining due and unpaid. It is simply an admission as to part payment, and does not turn the pleading into an action solely upon an account stated. The answer of the defendant does not specifically deny the fact that that amount was due to the plaintiffs for the first year's work, unless the general denial which follows the allegations of payment in full for the amount due for both seasons' work shall be considered such denial. I suppose it will not be contended that where a plaintiff brings an action for work done at a given price, when the work is admitted to have been done and the price for doing it is also admitted, it would be necessary for him to prove that his claim had not been settled and paid, because he had alleged that fact in his complaint. Upon the pleadings alone it is clear that the plaintiffs are entitled to a larger judgment than the judgment rendered in this case by the circuit court.

The learned counsel for the appellant insists if it be admitted that in the absence of any proofs by either party the plaintiffs should recover, then, upon the testimony given on the trial by *Patrick Gaynor*, the judgment should have been in favor of the defendant, and that the learned circuit judge erred in reversing the decision of the referee upon the question of a final settlement and payment by the defendant of all claims of the plaintiffs for the work done under the contract.

After carefully looking over the evidence given on the subject of the settlement and payment for the entire work done under the contract, we conclude that the learned circuit judge was right in setting aside the findings of the referee on that subject. There is no evidence given by the plaintiff *Blewett* on the subject of settlement, except as to the first season's work, and as to that he simply testified, in answer to certain questions, as follows: "Question. At this time had the business of the former year been settled

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up, that is, had he [meaning defendant] paid for what you claimed to be the balance for the first season's business? Answer. No, sir. Q. At that time, what did you claim was the balance of the old business? A. Something over $3,000. Q. What did you claim to *Mr. Gaynor* that the balance was, or had you figured it together? A. Yes, we had, three thousand and some odd dollars. Q. That is the figure you claim in figuring it out with him? A. Yes, sir. Q. A part of which he disputed? A. Yes, sir. Q. There were some items in the old business that he claimed as offsets that you would not allow? A. Yes, sir. Q. But on your claim to him it was something over $3,000? A. Yes, sir." The time referred to in this evidence was early in the fall of 1884. The plaintiff *Blewett* was not cross-examined at all by the defendant in regard to this testimony. Upon the final cross-examination of *Blewett* the following questions were put to and answered by him: "Question. You understand that *Mr. James Gaynor* settled with your partner, don't you, for both years' logging? Answer. I never understood so. Q. Did you understand that they have settled all these matters? A. I did not. I have never understood that the first winter's logging was settled for. Q. Never have understood that they have had any settlement, then? A. No, sir; not for that one, any more than what *James* told me that spring that he had settled with *Pat*. Q. Then you did understand that he had settled with *Pat*, didn't you? A. For that winter I understood he claimed he had settled with him. Q. Didn't you understand he claimed he had settled for both winters? A. No, sir; I didn't. Q. Don't you understand that has been done? A. No, sir. I know nothing of the kind. Never heard anything about it. I never heard that *Pat* and *Jim* had had a complete settlement of both winters' logging."

The testimony of the plaintiff *Blewett* covers nearly eighteen pages of the case, and what is above quoted is all

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that in any way relates to any settlement of the claims of the plaintiffs against the defendant. All the other testimony of this witness was evidently introduced to sustain the plaintiffs' claim for damages under their second cause of action, which was disallowed by the court.

It is very clear that the testimony of *Blewett* does not in any way sustain the contention of the appellant that the claims of the plaintiffs were settled and paid for before this action was commenced, and no claim is made that the settlement was proved by the testimony of *Blewett*. But the counsel for the plaintiffs put the plaintiff *Patrick Gaynor* on the stand as a witness in their behalf, and he was examined and cross-examined at great length. His testimony covers about thirty pages in the printed case. The plaintiffs evidently put this plaintiff on the stand mainly for the purpose of producing testimony to sustain their second cause of action for damages on account of the alleged refusal of the defendant to permit the plaintiffs to put in a larger quantity of logs in the season of 1884–5, and it will also be seen by a careful reading of his testimony that the plaintiffs did not question him at all in relation to any settlement or adjustment of the claims of the plaintiffs against the defendant, except such as had arisen out of the logging which was done the second season. It is not very apparent why the learned counsel for the plaintiffs examined this plaintiff upon the subject of settlement at all. But it is clear that he did not examine him at all as to any settlement, except as to the second season's business, and what was said by this witness as to a general settlement of all claims of the plaintiffs for all work done under the contract was called out on the cross-examination by the counsel for the defendant.

The question upon this appeal is whether the evidence of this witness, who though a party plaintiff is such party unwillingly on his part, and forced upon the other plaintiff by

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defendant, is conclusive that there was a fair settlement between the plaintiffs on the one part, and the defendant on the other, of all these claims. It is true, the witness says there was a settlement which was satisfactory to him, and that he gave a receipt in full; but he is unable to state how the accounts were adjusted, or how the admitted claims of the plaintiffs were adjusted and paid by the defendant. The admissions of the defendant upon the record show that the claims of the plaintiffs were not paid for in full by the defendant in money payments. His account rendered shows that the actual payments made were several thousand dollars less than these admitted claims, and, in order to satisfy them, it would be necessary that he should be allowed a large sum by the way of his counterclaims for rent of outfit, and for using up and the destruction of such outfit, and for other claims made against the plaintiffs for breaking roll-ways, which claims were disputed by the plaintiff *Blewett*, and which are set up as counterclaims in this action. The evidence of the plaintiff *Patrick Gaynor* as to a settlement of these claims and payment of them is simply a general statement that the settlement was made. The witness is unable or unwilling to state what claims of the defendant were allowed on such settlement, how they were settled, and how much was paid on such claims by the plaintiffs, or whether, in consideration of such agreement of settlement, the defendant released his claims against the plaintiffs upon the counterclaims set out in his answer in this action. He simply says he settled and gave a receipt in full, and can give no statement as to what was allowed in such settlement on either side, except that $500 was afterwards paid to the witness by the defendant in pursuance of such settlement. The defendant did not produce the receipt which the plaintiff *Patrick Gaynor* says he gave on such settlement.

We think the law is very plain that a settlement made by one of two partners of a claim due the partnership

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must be a fair and reasonable settlement in order to bind the firm, and, if the settlement be in fraud of the firm or of one of the partners of the firm, it will not defeat the action of the firm. 1 Collyer on Partn. (6th ed.), 675; 2 id. 975; *Barker v. Richardson*, 1 Younge & J. 362; *Phillips v. Clagett*, 11 Mees. & W. 84; *Viles v. Bangs*, 36 Wis. 140; *Cotzhausen v. Judd*, 43 Wis. 216, 217. We think the learned circuit judge was fully justified in holding that this evidence was insufficient to justify a court or jury in finding that any settlement was in fact made, and especially that a fair and honest settlement had been made between the defendant and *Patrick Gaynor*, of the claims of the plaintiffs against the defendant. That the defendant did not rely with great confidence on the fact that a settlement of all their controversy had been made is evident from the fact that he pleaded his counterclaims in this action, and asked the judgment of the court on each of them. Considering the general statements of the witness as to the settlement, and the failure of the witness to give any intelligent statement as to what took place when such settlement was made, and the fact that the witness, although a party plaintiff, was clearly in the interest and to a considerable extent under the control of the defendant, the evidence of settlement of all the plaintiffs' claims was not so clearly established as that a court or jury were bound as a matter of law to find that such settlement was in fact made. At best it can only be said that there was evidence which, if believed, tended to show a settlement, and it was still a question of fact for the court or jury to find either for or against the fact of settlement. We are satisfied with the finding of the learned circuit judge upon that point.

It is urged by the learned counsel for the defendant that as to the plaintiff *Patrick Gaynor*, he ought not, on his own statement, to be entitled to recover in this action, and that the judgment should only have been in favor of the plaint-

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iffs for one half their claims. There would be force in this contention if it were established that, as between the two plaintiffs, each was entitled to one half the sum due from the defendant; but their rights as between themselves are not shown by the evidence in this case. And if it should upon investigation be shown that *Patrick Gaynor*, as between himself and *Blewett*, was entitled to one half of the sum due them from the defendant, or more or less than one half, the defendant could probably limit the plaintiff *Blewett* in collecting the judgment to the amount which was actually due him from the defendant as between himself and *Patrick Gaynor*, upon his obtaining a release of the judgment by *Patrick Gaynor*, or by some proper proceeding to satisfy the judgment.

The learned counsel for the appellant insists that the judgment should be reversed because the circuit court refused to permit the case to be opened for the receipt of further testimony on the part of the defendant. This motion is one peculiarly addressed to the discretion of the trial judge, and his determination is conclusive unless it clearly appears that injustice will be done to the defendant by refusing to open the case and receive the evidence offered. As the defendant was permitted to withdraw all his counterclaims, and as the judgment is not greatly in excess of the amount admitted to be due upon the contract, exclusive of such counterclaims, and as it clearly appears that the defendant still has it in his power to limit the enforcement of the judgment to the amount actually due to the plaintiff *Blewett* on the contract as between himself and *Patrick Gaynor*, we do not see that any great injustice is likely to result from the refusal of the learned judge to open the case for further proofs. We must therefore decline to reverse the judgment for that cause.

By the Court.— The judgment of the circuit court is affirmed.

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SHEEHY, Respondent, vs. BLAKE and others, Appellants.

September 5 — September 23, 1890.

(*1*) *Pleading: Admission in answer.* (*2*) *Unincorporated religious society: Individual liability of members: Agency: Ratification.*

1. A complaint alleged "that on March 10, 1883, and for many years theretofore, the defendants were, and they still are, a voluntary, unincorporated association of persons" known as the society of St. Patrick's church. The answer was that said defendants "admit that previous to the year 1883 they were members of and met at a certain church . . . known as 'St. Patrick's Church.'" *Held*, that this was an admission of the defendant's membership at and previous to the year 1883.
2. The evidence in this case — tending to show, among other things, that the financial and secular affairs of an unincorporated religious society were managed by trustees and a secretary and treasurer elected from time to time by the congregation, together with the officiating priest; that moneys were advanced for the society from time to time by the priest, C., for the erection of a church building, and that he allowed much of his salary to remain in arrears; that the secretary kept regular books showing the accounts between the society and said priest, and from time to time these were balanced and the amount of the indebtedness to the priest publicly stated to the congregation assembled in the church; that finally, after said C. had been succeeded by another priest, a final settlement of said accounts was made by a member of the society as attorney for C., and by a committee consisting of a former secretary of the society, an attorney at law, and trustee thereof, and the successor of C. in the priesthood, representing the society; and that the amount of the indebtedness to C. was then determined and the terms of payment fixed — is *held* to sustain findings by the jury that said committee was authorized by the members of the society to make such settlement, and that it was ratified and approved by them. Such members are therefore individually liable to pay the indebtedness thus found due to C.

APPEAL from the Circuit Court for *Fond du Lac* County.

Action to recover a debt alleged to be due from the defendants, as members of an unincorporated church or congregation, upon an account stated between them and Rev.

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James Colton, the plaintiff's assignor, on March 10, 1883. On a former appeal (72 Wis. 411) an order striking out a demurrer to the complaint was affirmed.

The answer denies that certain of the defendants were members of the congregation or church on March 10, 1883, or at any time previous thereto, and admits that the other defendants were members previous to the year 1883. It also denies that an account was stated, as alleged in the complaint, between Rev. James Colton and the members of the church, or any one authorized to act for them; and denies that on March 10, 1883, or for more than one year prior thereto, or at any time subsequent thereto, the defendants or either of them were indebted, jointly or severally, to the Rev. James Colton in any sum whatever. Other matters of defense contained in the answer need not be here stated.

The facts appearing from the evidence are stated in the opinion. At the close of the testimony a nonsuit was granted as to those defendants whose membership in the church was denied in the answer.

The jury, by a special verdict, found, among other things, (1) that the Rev. J. J. Keenan, A. A. Kelly, and Felix Rogers were authorized by the defendants, as members of St. Patrick's congregation, to state an account and settle their indebtedness with the Rev. James Colton, and that for and in behalf of the defendants they made the contract dated March 10, 1883; and (2) that the defendants, after having knowledge that such contract was made, ratified and approved the same. From the judgment entered upon the special verdict in favor of the plaintiff, the defendants appealed.

For the appellants there were briefs by *Gerphcide & McKenna* and *Kelly & Martin*, attorneys, and *Pinney & Sanborn*, of counsel, and oral argument by *Morris McKenna* and *S. U. Pinney*.

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For the respondent there were briefs by *J. H. McCrory* and *Shepard & Shepard*, attorneys, and *Edward W. Frost*, of counsel, and oral argument by *C. E. Shepard* and *J. H. McCrory*.

ORTON, J. The testimony tends to show the following facts: About the year 1860, the society or association of the St. Patrick's Church of Fond du Lac, composed of the congregation of said church, was formed without any incorporation, as is customary with that church. Its financial and secular affairs were managed by a board of trustees elected from time to time by the congregation, together with the officiating priest, and the secretary and treasurer also so elected from time to time. In about the year 1863, the Rev. James Colton became the priest of said church, and so remained until his health failed in 1881, when the present priest of said church, the Rev. J. J. Keenan, was appointed to take his place. When the Rev. Mr. Colton took charge of said congregation he found it without any good place of worship, and very poor, and badly in debt, and during the next few years he assisted it in building a large brick church, and advanced for them, from time to time, large sums of money, and allowed much of his salary to remain in arrears. Regular books of the congregation were opened and kept by the secretary of the society, showing all these transactions, and the accounts between the society and said Colton from that year until March 10, 1883, and all the payments thereon. From time to time said books were balanced and the exact amount of the indebtedness of the society to said Rev. Mr. Colton clearly shown. At each time of said rests or settlements, the state of said accounts was publicly stated or published and made known to the congregation assembled in said church, composed of all the then members thereof. It appears that the said Rev. Mr. Colton loaned the society the sum of $2,000 to

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aid them in building said new church, in 1865 or 1866, and this loan was placed upon the books as the "Hamilton" indebtedness, to conceal the name of said Rev. Mr. Colton, for some reason of his own. This, together with his back salary and sums of money otherwise advanced by him, remained on interest, by the understanding of the congregation. These balances so found and published and on the books, or some of them, are as follows: The said Hamilton debt of $2,000, and other indebtedness of the society to Rev. Mr. Colton of $1,366.02, in 1870. In 1871, the other indebtedness was $1,080.31. In 1875, it was $1,177.02. In 1876, $715.61. In 1877, the Hamilton debt, with accrued interest, was $2,291.67, and the other indebtedness, $906.67. In 1878, the Hamilton debt and interest were $2,156.66, and the other indebtedness, $865.89. In 1880, the other indebtedness was $1,286.64. And finally, March 1, 1881, deducting all payments, the total amount of the indebtedness of the society to said Rev. Mr. Colton was stated and published at $3,220.24. The interest is added to the debt, and all the payments are duly credited on the books. The last statements since 1881 appear upon new books, with the Rev. J. J. Keenan as pastor and treasurer. These statements, since 1871, are signed by the secretary and treasurer as correct. Then on March 10, 1883, a final settlement of these accounts was made by Mr. Duffy, a member of the congregation, as attorney of the Rev. Mr. Colton, by a Mr. Gough, who had been secretary of the society from 1863 to 1870, and A. A. Kelly, an attorney at law and one of the trustees of the society, acting for the congregation, and by the officiating priest, the Rev. J. J. Keenan. On an account stated, the congregation was found to be indebted to the Rev. Mr. Colton in the sum and balance of $3,220.20, and the terms of payment fixed. Since then there has been paid on said indebtedness so found the sum of $450. On April 19, 1884, the said Rev. Mr. Colton, being on his death-

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bed, assigned his said account and settlement to his sister, the plaintiff in this action, and soon after died.

The complaint charges individual members of said society with this indebtedness shown upon the books, and so balanced from time to time, and determined and fixed by said settlement, alleging that they were members of said society during such time, and assented to and authorized said indebtedness, and became individually liable for the same. The learned circuit court construed the answer as having admitted the membership of the defendants, except certain ones named therein; but this construction of the answer is contested by the learned counsel of the appellants. We are unable to put any other construction upon some specific admissions of the answer than an admission of their membership. The complaint alleges "that on March 10, 1883, and for many years theretofore, the defendants were, and they still are, a voluntary unincorporated association of persons," etc. The answer is "that said defendants (excepting certain ones named) admit that previous to the year 1883, they were members of and met at a certain church in the city of Fond du Lac, known as 'St. Patrick's Church,' and at said church conducted religious and devotional exercises according to the rites and doctrines of said church, and that the membership of said church was constantly changing by the admission of new members and by the death and removal of others." The answer then puts in issue the account and settlement, and denies their having empowered any one to make such settlement, and their assent to such indebtedness. The above admission is as broad as language could make it. For this reason no evidence was adduced by the plaintiff to prove that the defendants named were members of said society at and previous to the year 1883. We think that the learned circuit court was clearly correct in its construction of the answer as an admission of the defendants' membership. The persons so

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excepted in the answer were omitted in the verdict and judgment.

The only important question on the merits of this case is whether these defendants, as members of the congregation, ever became bound as individuals to pay this indebtedness by their assent to or ratification of it, or by their authorizing others to make such final statement. There is really no question of law reserved which affects the merits and justice of the plaintiff's claim. The decision of this court in the case when it was here on demurrer to the complaint (72 Wis. 411), is a final adjudication of the liability of the defendants on the facts stated in the complaint, and comes very near, if not quite, an adjudication of their liability on the facts proved on the trial. In the opinion of the chief justice, "the trustees with the priest had full power to incur debts for the association, which became the joint and several indebtedness of its members. . . . The trustees and parish priest, in incurring the alleged indebtedness, acted merely as the agents of the association and its members, with power to bind them jointly and severally by their acts. . . . They approved of or participated in contracting it, and subsequently assumed and agreed to pay it through their authorized agents." The authority of the trustees and the priest is the same according to the facts proved as in the complaint,— to contract debts for the association, and to settle the same. Cases are cited in the opinion, in which is held that the authority of agents of unincorporated associations was established on less evidence.

In most cases it would be extremely difficult to charge liability on the individual members of such an association by proof of any personal participation in incurring the indebtedness; and, from necessity, their liability has to be inferred from the manner in which such business was done and their relation to those who acted directly in incurring it. The members of such an association cannot personally

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attend to the building of churches, the payment of the minister's salary, the making of contracts, or to the financial affairs generally of the association. If their manner of doing their business was to appoint trustees and employ a priest to attend to such matters, and to have a secretary to keep their books of account, and to appoint committees or certain persons to settle and adjust doubtful or contested claims, it seems plain that they ought to be bound by their action as their agents. It is doubtful if there is any case in the books where there is so much evidence of the assent to or ratification of a claim against the association, or the authority conferred on agents by the members of the association, as in this case. The evidence is overwhelming that the defendants, as members of this association, have for many years known all about this indebtedness to Rev. Mr. Colton, and the exact balance of it from time to time through a series of many years, and tacitly assented to it and ratified it, and knew about the final settlement of it and approved it. They must have known all the time what their trustees and other agents did in incurring it, and how it was incurred and for what purpose, and their final settlement of it. If it had been a single and unrepeated transaction it would require more evidence of their assent or of the authority given to agents. From 1863 down to 1881 many rests were made in the account, and balances were struck showing the exact amount of this debt of their association to Rev. Mr. Colton, from time to time and many times, and they were published or stated publicly to the congregation on the Sabbath, when all the members are supposed to have been present.

Is it reasonable to doubt after all these publications of it that there were any members who did not know the amount of this indebtedness, not once only, but many times? All the members must be presumed to take a personal interest in the financial concerns of the association, and to take cog-

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nizance of these publications of their trustees and agents on the subject of their own indebtedness from time to time. They did know the amount of this claim down to the time of the final settlement of 1883, and then the settlement consisted merely in balancing the accounts on the books, and in thus fixing the amount to be paid. They never objected to this claim until after that, and therefore tacitly assented to it. They are presumed to have known of the appointment of the committee to adjust it, and it was their committee. The trustees were their trustees, and those deputed to settle with the Rev. Mr. Colton on the 10th of March, 1883, were deputed by themselves to make the settlement, and why were they not their authorized agents to act for them in doing so? In all other cases such authority would be deemed sufficient. We cannot but think that the assent, ratification, and authority conferred were amply proved. It is too plain a case for doubt or cavil. The members stand in the place of a corporation, and act by their own officers and agents. The debt in the first place is their debt, and they are presumed to know all about it. The books kept by their secretary were their books, and they are presumed to know what accounts are on them, and the state of such accounts. But here the evidence, aside from presumptions and inferences, is ample to show ratification as well as the authority of those who made the settlement. The learned counsel of the appellants have cited no case in conflict with these principles, and the law governing this case is elementary and needs no authorities. It was clearly and correctly stated by the learned circuit judge in his instructions to the jury.

By the Court.—The judgment of the circuit court is affirmed.

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SHAKMAN, Appellant, vs. SCHLUETER, Garnishee, Respondent.

September 5 — September 23, 1890.

Debtor and creditor: Voluntary assignment: Approval of bond.

A voluntary assignment does not vest title in the assignee as against creditors until the officer to whom the bond of the assignee is delivered has indorsed his approval thereon.

APPEAL from the Circuit Court for *Sheboygan* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action was commenced March 8, 1889, to enforce the collection of $482 against the defendant Poggenburg, and on the same day the garnishee summons and affidavit were served on the garnishee defendant, *Schlueter*, personally. The garnishee answered, justifying under a general assignment for the benefit of creditors, dated March 6, 1889, made and acknowledged by said Poggénburg on that day, before a justice of the peace, with the consent of said assignee to take upon himself the discharge of the several trusts specified in the assignment indorsed on the copy thereof, and thereby certified to be correct; that March 7, 1889, the said copy and indorsement were certified to by a circuit court commissioner, and that the same was made thereon in his presence; that the assignee's bond was dated March 7, 1889, executed by said garnishee and two sureties who justified, and an affidavit of the nominal amount of the assets, signed by the assignor and another, was annexed to said bond and sworn to, March 6, 1889; that a copy of said assignment and said bond were filed in the office of the clerk of the court, March 7, 1889, but without the approval hereinafter mentioned being indorsed thereon.

The plaintiff took issue with said answer, and upon the trial thereof, in addition to the facts stated, the court found, as matters of fact, that on September 27, 1889, the

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plaintiff duly recovered judgment against said Poggenburg for $532.69; that at and before the time of the service of said garnishee process the said garnishee had in his control and possession, under said assignment, all the property, goods, and effects belonging to said assignor, and that the same had since been converted into money and amounted to over $4,000; that said assignee had been removed, and in his place another had been appointed; that he had in his hands, at the trial, $500 in money, and other property, which he received as such assignee; that March 9, 1889, the circuit court commissioner indorsed upon said bond, then on file with the clerk of the court, his approval in the words, "I hereby approve the within bond," signed by said court commissioner; that said indorsement was not made until in the afternoon of the day and year last mentioned.

And, as conclusions of law, the court found that neither the said *F. Schlueter* nor his successor, as assignee, is liable to the plaintiff as garnishee in this action; that the garnishee is entitled to judgment; that the actions and proceedings herein against him as garnishee be dismissed with costs.

From the judgment entered upon said findings the plaintiff appeals.

Leopold Hammel, for the appellant.

A. C. Prescott, for the respondent.

CASSODAY, J. To make a voluntary assignment for the benefit of, or in trust for, creditors, valid as against the creditors of the person making the same, it is essential that all the requirements of the statutes should be substantially complied with. Secs. 1694–1696, R. S. Such several requirements have frequently been pointed out by this court. *Fuhrman v. Jones*, 68 Wis. 497; *Clark v. Lamoreux*, 70 Wis. 508; *Hanson v. Dunn*, 76 Wis. 455. Among the things thus specifically required by the statutes is that the officer tak-

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ing the bond of the assignee with two or more sufficient sureties, *shall be satisfied*, as therein prescribed, "that the property of such sureties, being within this state, is worth in the aggregate the sum specified therein." Sec. 1694, R. S. Such bond and a copy of the assignment, executed in the manner prescribed, must be immediately filed by the officer taking the same, in the office of the clerk, and there kept by such clerk in his office, subject at all times to the inspection of all parties interested. Sec. 1695, R. S.; *Fuhrman v. Jones*, 68 Wis. 501. Such requirements are so many conditions precedent to the assignee's right to the property assigned as against the creditors of the assignor. *Ibid.* The fact that such completed bond and copy of the assignment are to be kept by such clerk, subject at all times to the inspection of all parties interested, very clearly indicates that no part of such requirements can be left to the mere memory of such officer, or rest in parol. Here the approval of the bond by the officer taking the same was not indorsed until more than a day after the service of the garnishee process. If the matter of such approval could rest in parol for a day, then it could for a month, or be dispensed with altogether. But such is not the policy of the statutes. This is fully pointed out in the opinions of this court in the cases cited, and no repetition is here necessary. In *Lindsay v. Guy*, 57 Wis. 200, relied upon by the learned counsel for the respondent, a certificate of such satisfaction of the officer was in fact indorsed before the commencement of the creditor's action. We must hold that the assignment was incomplete, and vested no title or right in the assignee to the property assigned as against the plaintiff as a creditor of the assignor, at the time the garnishee process was served.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in favor of the plaintiff and against the garnishee in accordance with this opinion.

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MURRAY, Administrator, Respondent, vs. NORWOOD and another, Appellants.

September 6 — September 23, 1890.

(1) Foreign administrators: Filing appointment in this state. (2) Expert testimony: Value of municipal bonds. (3-6) Replevin: Identification of property: Evidence: Presumptions as to ownership and possession: Instructions to jury.

1. Under sec. 3267, R. S., a foreign administrator may have the same rights and remedies as one appointed in this state, upon filing his appointment or a duly authenticated copy thereof in *any* county court in this state — not necessarily in a county in which the decedent had property or in which suit is to be brought.
2. A witness who had been in the banking business for twenty-two years, engaged in buying and selling municipal bonds, and who had a general knowledge of the value of such securities, was competent to give an opinion as to the value of Atlanta city bonds, although he had never dealt in them and had no special knowledge as to their market value.
3. In replevin by an administrator for a certain sum of money and certain municipal bonds claimed to have been sent by the decedent in a box by express to one of the defendants, evidence showing the denomination of the bank bills sent and the numbers and amounts of the bonds, is *held* sufficiently to identify and describe the property.
4. A witness for the plaintiff having testified that a certain amount of money was put into the box and sent to one of the defendants, and the defendants having testified that they did not receive any money in the box, it was not error to charge the jury that the amount of money which was deposited in the box and sent should be determined from the testimony of the plaintiff's witness alone.
5. It was not error to charge that if the decedent, shortly before his death, or at the time it was claimed the box was sent, had the money and bonds in his possession, then the presumption was that he was the owner of the same at the time of his death, and that the plaintiff was entitled to the possession thereof.
6. Nor was it error to charge that if the defendants were in possession of the property at the time the box was received, the presumption was, unless the property was wrongfully disposed of, it was in their possession at the commencement of the action; and if they were in

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possession of the property at the time the box was received, but had wrongfully placed it in the possession of some one else, to conceal it or to prevent the plaintiff from recovering it, then they were liable the same as if they were in the actual possession of the property

APPEAL from the Circuit Court for *Sheboygan* County.

Action of replevin to recover possession of "$200 in bank bills and silver" and certain municipal bonds of the city of Atlanta, Georgia, described as Nos. 11, 60, 61, 64, 65, and 83, for $1,000 each, and Nos. 446, 447, 448, and 657, for $500 each. The bonds are alleged to be of the value of $10,000, and, together with the $200, to have been the property of John H. Norwood, deceased, at the time of his death. The plaintiff claims as administrator of the estate of said John H. Norwood.

The defendants answered separately, each denying "generally and specifically each and every allegation contained in the complaint."

On the trial, John B. Le Saulnier, a witness for the plaintiff, testified, under objection, that bonds of the city of Atlanta, such as those in suit, would be worth in the market a premium above their par value, varying in amount according to the rate of interest which they bore and the date of their maturity. A further reference to this testimony will be found in the opinion, in which also the other evidence and the instructions to the jury are sufficiently stated.

The verdict was as follows: "We, the jury in the above-entitled action, find for the plaintiff in said action, that he is entitled to the possession of the property described in the complaint, and assess the value thereof at the sum of $9,370, and find that the same is unlawfully detained by the defendants." From the judgment entered upon such verdict in favor of the plaintiff the defendants appeal.

Edw. S. Bragg, for the appellants.

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For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders* and *W. K. Gibson*.

COLE, C. J. This is an action of replevin brought by a foreign administrator to recover property belonging to the estate of the testator. It is objected that it did not appear that the plaintiff had legal capacity to bring the suit in this state. This objection is naturally the one first to be considered. The complaint alleges that in September, 1886, John H. Norwood, who was then a resident of the city of Washington, in the District of Columbia, died in said city of Washington, and that on or about the 2d day of February, 1887, the above plaintiff was duly appointed the administrator of the estate of John H. Norwood, deceased, before the supreme court of the District of Columbia, holding a special term for orphans' court business, and that thereafter, on the same day, said plaintiff duly qualified as such administrator, and as such is entitled to the possession of all the personal property belonging to the estate of John H. Norwood, deceased; that before the commencement of the above-entitled action a copy of the original appointment of such plaintiff as such administrator, duly authenticated as required to make the same receivable in evidence, had been filed in the county court of Milwaukee county, and is now on file therein, etc. The answers denied generally and specifically each and every allegation of the complaint.

Now, sec. 3267, R. S., provides, in effect, when an executor or administrator shall have been duly appointed in any other state, territory, or country, on the estate of any person not a resident of this state at the time of his death, and no executor or administrator shall have been appointed in this state, such foreign executor or administrator, upon filing his original appointment, or a copy thereof duly authenticated as required to make the same receivable in

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evidence, in any county court in this state, may thereafter exercise any power over such estate, . . . prosecute and defend any action relating thereto, and have all the rights and remedies which an executor or administrator appointed in this state can have or exercise. This provision, which seems to have been fully complied with, removed all disability of the plaintiff to sue in the courts of this state. A copy of his original appointment as administrator, duly authenticated so as to make the same receivable in evidence, was duly filed in the county court of Milwaukee county; but the learned counsel for the defendants insists that this was not a sufficient compliance with the statute, because he says such filing should have been in the county court of Sheboygan county, where the property was at the time, and where the action was afterwards brought. We cannot concur in this construction of the statute. The manifest intent of the provision seems to be to give the filing of a duly authenticated copy in the county court the same legal effect which would be given to the record of an original appointment made by a court of this state; for the language is that the copy is to be filed in any county court in the state. It does not say in the county court of a county where there are assets, or where the suit is to be brought. When the proper copy of the original appointment is duly filed in any county court, the foreign administrator or executor is placed upon the same footing as a domestic administrator or executor, so far as capacity to sue in our courts is concerned. He need not take out any new letters of administration, nor obtain any further appointment from the courts of this state, because his authority or title derived from the foreign court is all-sufficient. The statute gives him the right to prosecute and defend all actions relating to his estate, and he can exercise over such estate any power which a domestic administrator or executor would have or could exercise. But before the record is made by

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the filing of the properly authenticated copy, or by the filing of the original appointment, the disability of the foreign administrator to sue here continues; but with the record made the disability ceases under the statute. *Smith v. Peckham*, 39 Wis. 414.

We may likewise add here that sec. 4200, R. S., provides, "whenever a plaintiff shall sue as an executor, administrator, guardian, or trustee, and shall allege in his complaint his due appointment as such, and, if appointed in another state or foreign country, the filing or recording of the authenticated copy of his appointment as required by the laws of this state, such allegations shall be taken as true, unless specifically denied by the defendant by his answer, duly verified." There was no denial under oath in the answers of any fact or matter stated in the complaint, and therefore the allegations in regard to the appointment and the filing of the authenticated copy of the same were properly taken as true without proof.

It is further said there is no averment in the complaint that the deceased had any goods or chattels in Milwaukee county, where the duly authenticated copy was filed; but, from the views which we have expressed as to the meaning of the statute, it is clear that no such averment was necessary, nor was it essential to allege that John H. Norwood was not a resident of Wisconsin when he died. It is, however, distinctly alleged that he was a resident of the city of Washington when he died; and there is abundant evidence to prove that allegation. We do not cite the testimony which establishes the fact, because it is unnecessary. It will be found in the bill of exceptions, and clearly and conclusively proves the allegation as to residence. Whether sec. 4200, R. S., did not dispense with this proof, in view of the answer, is a question we need not decide. It is sufficient to say that the proof was most satisfactory that

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John H. Norwood did not reside in this state at the time of his death.

It is further insisted that the court below erred in receiving the testimony of the witness Le Saulnier, and permitting it to go to the jury to establish the value of the bonds. The property which the plaintiff seeks to recover the possession of is described in the complaint as $200 in bank-bills and silver, and certain municipal bonds of the city of Atlanta, Georgia, giving the numbers and amounts thereof. The witness testified that he had been engaged in the banking business in Milwaukee for twenty-two years, and had bought and sold municipal bonds, but had never dealt in Atlanta bonds, and had no special knowledge as to their market value; but he was permitted to give an opinion, under objection, as to the market value of Atlanta city bonds maturing in 1902, running at eight per cent. interest. We think the testimony of the witness was competent. It comes within the principle of numerous adjudications which admit the opinions of witnesses as to value. The witness was a banker, engaged in buying and selling municipal bonds. He had a general knowledge of the value of such securities from having dealt in them. True, he had not bought and sold Atlanta bonds, nor was it necessary he should in order to qualify him to give an opinion as to their value. His experience and information acquired in the business of banking would enable him to testify as to the value of such bonds, though he had not dealt in them. "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent of itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify." *Whitney v.*

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Thacher, 117 Mass. 523. Mr. Wharton lays down the same rule, and cites many decisions in his notes to sustain the text. 1 Whart. Ev. § 446. He says, on questions of valuation of property it is impracticable to lay down any precise line of demarkation between the expert and non-expert. The safest course is to permit the examination of all having experience in or acquaintance with the thing to be valued, leaving their authority to be tested on their cross-examination. We therefore think there was no error in the admission of the evidence, nor in the instruction of the court upon that point. We will furthermore add that the testimony of this witness as to the value of the bonds was really unimportant, as a computation will show that the full amount of the face of the bonds, with interest thereon, was not recovered in the action. So the testimony could not have done the defendants any harm, even if improperly admitted.

It is further objected that the money and bonds were not sufficiently identified or described so that they could be distinguished from other property of that kind. It was claimed on the part of the plaintiff that the money and bonds in question were put into a tin box at Washington; that the box was locked, and sent by express to the defendant *Josephine Norwood* at Sheboygan Falls. There was evidence tending to prove the numbers and amounts of the bonds, and the denomination of the bank-bills which were placed in the box, and this evidence sufficiently identified and described the property, especially in view of the fact that the defendants presumably had the property in their possession or under their control, and could have corrected any mistakes made by the plaintiff's witnesses in the description of it. The witness Gary testified that he helped John H. Norwood to put the bonds and bank-bills of certain denomination in the tin box with other papers, and that the box was then locked, and he himself left it at the ex-

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press office, directed to the defendant *Josephine Norwood*, Sheboygan Falls. This showed that this money and these bonds were so placed by the deceased in a box that they could be distinguished from other money and other bonds; and, under the circumstances, the presumption is that the description of the property by the plaintiff's witnesses was correct, for if it had not been the defendants would have furnished the correct description, as the property was presumably in their possession.

And here we will notice an exception which was taken to that portion of the charge in which the court told the jury that, if they found that the plaintiff was entitled to recover, then the only testimony in regard to the amount of money which was placed in this box was given by the witness Gary, and that the jury should ascertain and determine from his testimony, and his testimony alone, the amount of money which was deposited in the box and sent, as claimed, to the defendant *Josephine Norwood* at Sheboygan Falls. This direction of the court was correct, for the record does not contain any testimony except that of Gary as to the amount of bills or money which was deposited in the box. True, the defendants both testified that they did not receive in the box $200 in currency, nor any other amount of money, but from the nature of the case they could not and did not contradict Gary as to the money which was put in the box at Washington. But under the charge of the court the jury must have found that the bonds and money were received by the defendants at Sheboygan Falls, and that they were under the control of the defendants when the suit was commenced.

The will of John H. Norwood, purporting to have been probated by the orphans' court of the District of Columbia, was offered in evidence by the defendants, from which it appeared that Ralph W. Norwood was named as executor therein. Such being the case, it is said no letters of ad-

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ministration could issue to the plaintiff; but Ralph W. Norwood testified that he renounced the trust, and did not qualify as executor, so letters of administration with the will annexed could properly issue to the plaintiff.

A number of exceptions were taken to the charge, some of which are covered by the observations which we have made on the case, and need not be further noticed. The charge is quite lengthy, and seems to have submitted all questions of fact under proper instructions to the jury. Among other things, the court told the jury that if John H. Norwood, shortly before his death, or at the time it is claimed the box was expressed to the defendant *Josephine Norwood*, had the bonds and money in question in his possession, then the presumption was that he was the owner of the same at the time of his death, and that the plaintiff was entitled to the possession of the property described. We see no error in this instruction. The possession of personal property is *prima facie* proof of ownership, and if the box with the bonds and money were deposited in the express office in the city of Washington, duly addressed to the defendant *Norwood* at Sheboygan Falls, it is *prima facie* or presumptive evidence that the property in it, or bonds and money, whatever they were, were in the box when it was received at Sheboygan Falls. That presumption will continue until it is shown by evidence that no bonds or money were in the box. This was the charge of the court, and the court added, if no bonds were received by the defendants with this box at Sheboygan Falls, then they were entitled to a verdict. But if the bonds and money in question were in the box at the time it was received at Sheboygan Falls, it would then be for the jury to determine whether or not the bonds and money were in the possession of the defendants or under their control at the time of the commencement of the action. If the defendants were in possession of the property described in

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the complaint at the time the box was received, the presumption is, unless the property was wrongfully disposed of, it was in their possession at the time of the commencement of this action. If the defendants were in the possession of the property at the time the box was received, but had wrongfully placed the bonds or money in question in the possession of some one else, for the purpose of concealing the same or to prevent the plaintiff from recovering possession thereof, then the defendants were liable the same as if they were in the actual possession of the property.

There was a sufficient demand alleged and proven, if any demand were necessary where the agent refuses to restore the property which he has received for safe-keeping. The letters which were introduced in evidence showed that the tin box and contents were more than once demanded of the defendants and such demand refused. It is plain, if the plaintiff was entitled to recover, he should recover the market price of the bonds which the evidence showed had been received by the defendants. We see no objection to the amount of the recovery, nor to the sufficiency or form of the verdict. This disposes of all the material questions in the case.

By the Court.— The judgment of the circuit court is affirmed.

Fox, Appellant, vs. ZIMMERMANN and others, Respondents.

September 6 — September 23, 1890.

Tax titles: Agency: Fraud: Husband and wife: Limitation of actions.

1. If an agent employed to collect rents and pay taxes on land, having rents in his hands sufficient to pay the taxes, allows the land to be sold therefor and purchases at the tax sale, it amounts to a redemption from the sale, and he thereby acquires no valid title as against his principal.

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2. The result is the same if the agent purchases at the tax sale as agent for his wife and in her name, for in such case she is chargeable with notice of the fraud.
3. Testimony of a husband that, because of some trouble, he had conveyed all his property to his wife; that she kept all the money, and when he wanted any gave it to him; and that she gave him the money with which he purchased tax certificates, does not show that she had any separate estate with which to purchase the certificates.
4. The special limitations upon actions to recover lands sold for taxes (secs. 1188, 1210*d*, R. S.; secs. 2, 3, ch. 309, Laws of 1880; ch. 250, Laws of 1882; ch. 153, Laws of 1883; ch. 133, Laws of 1885), relate exclusively to actions in which the validity or regularity of the tax proceedings is questioned, and do not apply to an action based upon the defendant's fraud in acquiring a tax title.
5. Under sec. 4222, R. S., providing that in an action for relief on the ground of fraud the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud, mere constructive notice is not such discovery.

APPEAL from the Circuit Court for *Sheboygan* County.

The action is ejectment to recover the possession of fifteen acres of land in or near the city of Sheboygan. The complaint is in the usual form. The defendants *Friederich Zimmermann* and *Lutz* answered jointly, denying the material allegations of the complaint; also that the defendant *Christine Zimmermann* is the owner of the land in controversy and entitled to the possession thereof; that the defendant *Friederich* is her husband and in possession of the land as such; and that *Lutz* is in possession thereof as her tenant. The answer of *Christine* alleges the same facts, and further that she owns the land by virtue of three tax deeds thereof, duly executed to her and recorded,—one in 1879, and the others in 1882,—for the unpaid taxes on the land thereby conveyed to her for the years 1873, 1877, and 1878, respectively. She also answers in bar of the action the limitations prescribed in the following statutes: Ch. 133, Laws of 1885; sec. 1210*d*, R. S.; ch. 250, Laws of 1882; ch. 153, Laws of 1883; secs. 2, 3, ch. 309, Laws of 1880; sec. 1188, R. S.; and sec. 4222, R. S.

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The testimony given on the trial satisfactorily shows that the defendant *Friederich* was the agent of the plaintiff from 1868 to 1879, inclusive, to collect the rents of the land in controversy, and to pay the taxes thereon with the money so collected. It also tends to show that he made such collections during that period. It was stipulated on the trial "that the rent in any one of those years from 1868 to 1879, if any rent was received, would pay more than the taxes for any of those years." Under a further stipulation of the parties, the following was the only question of fact submitted to the jury: "Did the defendant *Friederich Zimmermann* receive rent for the premises described in the complaint during any of the years from and including 1868 down to and including the year 1879? If you answer 'yes,' then state the years for which he so received the rent." To this question the jury answered: "Yes; for all the years mentioned in the above."

It was further proved on the trial that the defendant *Friederich* purchased the tax certificates upon which the tax deeds to his wife were issued, taking some, if not all, of them in his own name. If his wife had any interest in such purchases, he was her agent in making them and in subsequently taking the tax deeds in her name. He so testified, and his testimony is undisputed.

The judge filed findings in favor of the defendants to the effect that the defendant *Christine* is the owner of the land by virtue of her tax deeds thereof, and that several of the special statutes of limitations thus pleaded had run in favor of her title, against the plaintiff, before this action was commenced. The court also found that, up to the time the first tax deed was recorded, the plaintiff was the owner of the land, and that *Friederich* was not her continuing agent to collect rent or pay taxes. The plaintiff appeals from a judgment entered pursuant to such findings, dismissing the complaint with costs.

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For the appellant there was a brief by *Felix Benfey*, attorney, and *A. C. Prescott*, of counsel, and oral argument by *Mr. Prescott.*

For the respondents there was a brief by *Seaman & Williams*, and oral argument by *W. H. Seaman.*

LYON, J. We think the finding of the jury is supported by the testimony. Such finding and the admission, both of which are set out in the above statement of the case, establish the proposition that when the taxes accrued for each year from 1868 to 1879, inclusive, the defendant *Friederich* had in his hands the rents he collected to an amount sufficient to pay the taxes of such year. Of course he committed a gross fraud on the plaintiff when, in each of the years 1873, 1877, and 1878, he neglected to pay such taxes therewith, but allowed the land to be returned and sold and afterwards conveyed to his wife for nonpayment of taxes. If he purchased the certificates of sale in his own right, it amounted to a payment of the taxes and a redemption of the certificates from the tax sale. If he purchased them for his wife, the result is the same, for he had knowledge of the fraud he had committed and was committing on the plaintiff when he made the purchase. Notice to or knowledge of the agent in such case is notice to or knowledge of the principal. It was so held in *Wilcox v. Bates*, 26 Wis. 465. See, also, Story, Ag. §§ 140, 140*a;* 1 Am. & Eng. Ency. of Law, 419, and numerous cases cited in note 2.

The findings of the circuit court are too long to insert here. It is sufficient to state, in addition to what is said of them in the above statement of the case, that the judgment for defendants rests chiefly on the findings that *Mrs. Zimmermann*, through her husband and agent, purchased the tax certificates upon which her tax deeds issued with her own separate means, and had no notice or knowledge, at

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the time, of the fraud committed by her agent upon the plaintiff. But we have seen that she had constructive notice of the fraud, and that is just as fatal to her title under the tax deeds as actual notice would have been. She is in no better position than her agent would have been in had the tax deeds been executed to him instead of her.

Furthermore there is a total failure of proof that she had any separate estate. Had she been the owner of a separate estate in her own right, the fact might easily have been proved. She did not testify on the trial, and the testimony of her husband satisfactorily shows that she had no such estate. He testified that, because of some trouble he was theretofore having with some one, he conveyed all his property to his wife; that she kept all the money; that when he wanted any she gave it to him, and gave him the money with which he purchased the tax certificates. This is substantially all the proof there is on the subject. The court should have found that *Mrs. Zimmermann* had no separate estate, and that her husband purchased the certificates with his own money, and took the tax deeds thereon for his own use and benefit, although in the name of his wife; also that such tax deeds were void by reason of the fraud of *Friederich* in not paying the taxes with the money in his hands which he had received for the rent of the land, as it was his duty to do.

All the limitation statutes pleaded, save sec. 4222, R. S., and all which the court found were applicable to the case, relate exclusively to actions in which the validity or regularity of tax sales, etc., is involved. This is not such a case. No question is made here of the validity or regularity of the tax proceedings, but the tax deeds are attacked for fraud only, just as they might have been were they conveyances by private parties. It was held in *McMahon v. McGraw*, 26 Wis. 614, that such conveyances are not within any of those special limitation acts.

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Sec. 4222, R. S., contains a limitation of six years after the cause of action has accrued in an action for relief on the ground of fraud, with a certain exception therein named, and provides that "the cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." The question was raised in the argument whether this case is ruled by that section, or by the preceding section, which prescribes a limitation of ten years. It is not necessary to determine the question. We assume, for the purposes of this appeal, that it is governed by sec. 4222, which is most favorable to the defendants. There is no proof that plaintiff had any actual notice, six years before she commenced this action, that her land had been conveyed or sold for nonpayment of taxes. Mere constructive notice is not sufficient to put the statute in motion. It was so held in the case last cited.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

CRAWFORD, Administrator, and others, Respondents, vs. WITHERBEE and another, Appellants.

September 6 — September 23, 1890.

(1, 2) Mines and mining: Covenant running with land: Construction of drain: Who to repair. (3, 4) Evidence: Admission of title: Specific objections: Wills.

1. By a contract under seal C., M. & Co. agreed to excavate or run a "level" to drain certain mineral lands, and, in consideration thereof, W., the owner, agreed to render to them one eighth of all the mineral raised on said lands. It was expressly stipulated that the contract should be binding upon the heirs, executors, administrators, and assigns of both parties, and that the covenant of W. should run with the land; and, to secure to C., M. & Co. one eighth of the mineral raised, an undivided eighth of all the mineral in the lands was

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conveyed to them. *Held*, that the covenant of W. ran with the land.

2. The contract was silent as to the depth to which the level should be excavated, and as to who should keep it in repair. In an action by successors in title of C., M. & Co. against devisees of W. to recover the value of one eighth of the ore raised on the lands during a certain time, it appeared that though the level was somewhat out of repair, yet the ore was raised without trouble or increased expense by reason of water. *Held*, that the question whether or to what extent the plaintiffs were bound to keep the level in repair, was not raised.

3. A notice, given by the defendants to the plaintiffs before the action was commenced, to repair the level in compliance with the original agreement, is an admission that the plaintiffs are the successors of C., M. & Co. in the title.

4. An objection to the admission of a will in evidence on the ground that it is immaterial and incompetent for any purpose, is not available to exclude it on the ground that it is not sufficiently authenticated or proved.

APPEAL from the Circuit Court for *La Fayette* County.

Action to obtain an accounting of the amount of lead ore taken since February 1, 1885, from certain lands described in the complaint; to have the value of one eighth part of said ore ascertained and determined; to have it adjudged that the defendants pay said value to the plaintiffs, and that the plaintiffs have a lien on said lands therefor; and for a foreclosure of such lien in case of a default of payment. The facts and the findings of the trial court are sufficiently stated in the opinion. As a conclusion of law the trial court found that the plaintiffs were entitled to judgment for the sum of $670.21, with interest from the commencement of the action, and for costs. From the judgment entered accordingly the defendants appealed.

For the appellants there was a brief by *Orton & Osborn*, and oral argument by *P. A. Orton*. They contended, *inter alia*, that the covenant of Hiram Witherbee to pay one eighth of the ore raised on the lands, as compensation for the construction of the level, does not run with the lands of

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the covenantor so as to bind his devisees and assigns, the defendants in this action. (1) No interest in said lands passed to Crawford, Mills & Co. under the contract. There is, therefore, no privity of estate between the assignees of Crawford, Mills & Co. and the defendants, nor is there privity of contract, and therefore there can be no liability. (2) The covenant is not of a character to inhere in any estate which might have been conveyed by the contract so as to impose the charge of its performance upon the reversionary interest in the land which passed to the defendants. *Bronson v. Coffin*, 108 Mass. 175; *S. C.* 118 id. 156; *Walsh v. Barton*, 24 Ohio St. 28; *Kittle River R. Co. v. Eastern R. Co.* 41 Minn. 461; *Gibson v. Holden*, 115 Ill. 199; *Masury v. Southworth*, 9 Ohio St. 340; *Glenn v. Conby*, 24 Md. 127; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Cole v. Hughes*, 54 N. Y. 444; *Scott v. McMillan*, 76 id. 141; *Hart v. Lyon*, 90 id. 663; *Huling v. Chester*, 19 Mo. App. 607; *Bloch v. Isham*, 28 Ind. 37; *Harsha v. Reid*, 45 N. Y. 415; *West Va. Transp. Co. v. Ohio R. P. L. Co.* 22 W. Va. 600; *Wiggins F. Co. v. O. & M. R. Co.* 94 Ill. 83; *Newburg P. Co. v. Weare*, 44 Ohio St. 604; *Keppell v. Bailey*, 2 Mylne & K. 517; *Ackroyd v. Smith*, 10 C. B. 164; *Lynn v. Mt. Savage Iron Co.* 34 Md. 603; *Blount v. Harvey*, 6 Jones Law, 186; *Miller v. Noonan*, 83 Mo. 343; *Wheeler v. Schad*, 7 Neb. 204. The contract, if binding upon these defendants at all, is only binding in case the level is kept in repair by Crawford, Mills & Co. or those claiming under them.

W. E. Carter, for the respondents, cited, besides cases cited in the opinion, *Savage v. Mason*, 3 Cush. 500; *Morse v. Aldrich*, 19 Pick. 449; *Hurd v. Curtis*, id. 459; *Vernon v. Smith*, 5 Barn. & Ald. 1; *Keppell v. Bailey*, 2 Mylne & K. 517; *Bedford v. British Museum*, id. 562; Platt, Covenants, 460; 1 Smith's L. C. 116 *et seq.*; *Maine v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, 111 id. 113; *Richard-*

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son v. Tobey, 121 id. 457; *Hart v. Kucher*, 5 Serg. & R. 1; *Todd v. Stokes*, 10 Pa. St. 155; *Gilbert v. Drew*, id. 219; *Ingles v. Bringhurst*, 1 Dall. 341; *Burlock v. Peck*, 2 Duer, 90; *Hodge v. Sloan*, 107 N. Y. 244; Rawle, Covenants for Title, 342; 4 Am. & Eng. Ency. of Law, 497; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; 1 Smith's L. C. (Hare & W.'s notes), part I, p. 179; *Kentucky C. R. Co. v. Kenney*, 82 Ky. 154; *Goudy v. Goudy*, Wright (O.), 410; *Sandwith v. De Silver*, 1 Browne (Pa.), 221; *Coffin v. Talman*, 8 N. Y. 465; *Post v. Weil*, 115 id. 361; *Nye v. Hoyle*, 120 id. 195.

ORTON, J. The facts of this case are briefly and substantially as follows:

About the 10th day of September, 1862, Jefferson Crawford (now deceased), John L. Crawford, Gabriel Mills (deceased), and Henry Magor, as parties of the first part, entered into a contract in writing and under seal with one Hiram Witherbee (now deceased), who was the owner of the lands therein described, and situated in La Fayette county in this state, by which the said party of the first part agreed to excavate or run what is usually called a "level," commencing at the bottom of the tail race of "Crawford's Big Wheel," in a northerly direction up what is known as "Hard Scrabble Branch," or in such direction as they may deem best calculated to drain the said lands of said Witherbee, to be excavated as nearly level in its course as the purpose for which it is intended will permit, and to be commenced within a reasonable time after that date, and prosecuted with reasonable facility. The level was to be run a considerable part of the way through the lands of said Witherbee, described in the agreement, which were supposed to be mineral lands and to contain lead, and which could not be mined, on account of water, without being drained by said level, and which lay south of the north end

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of said level, and east and west of it. In consideration of the excavation of said level, the said Witherbee agreed to render to the party of the first part one clear eighth part of all lead mineral or lead ore raised upon said lands which lie east and west of any excavated portion of said level, and south of an east and west line across the extreme northerly end of the same, as fast as said level shall be prosecuted, free from all expense of discovering or separating it from the earth, and to be paid in kind on the land where raised. It is expressly stipulated in said agreement that it shall bind the heirs, executors, administrators, and assigns of both parties, and that the said covenant of said Witherbee shall run with said lands. In the said agreement, and for the purpose of securing to the party of the first part one eighth of all mineral raised on said lands, the said Witherbee thereby grants, bargains, and sells to the party of the first part, and to their heirs and assigns forever, one undivided eighth part of all lead mineral in any and all of said lands, to have and to hold the same, together with all and singular the right accruing under the agreement, to the said party of the first part and to their heirs and assigns forever.

It was found by the court that Crawford, Mills & Co. (said party of the first part), within a reasonable time after the execution of said agreement, began said level, and that it was excavated and run by them with reasonable energy and diligence to a point where an east and west line drawn across its northern extremity will pass northward of the places where the ores in controversy were mined, and that the same was so excavated and built many years before the said ores were mined; that the title of said Hiram Witherbee (now deceased) to said lands has become vested in the defendants by and through his devise thereof in his last will and testament, and that they are now in possession of them, and claim title thereto by virtue of said will and conveyances thereunder, and that the plaintiffs are the successors

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in title of the said Crawford, Mills & Co., and the owners of all the interest in and to said lands of said Hiram Witherbee conveyed by him in and by said agreement, and are also the owners of said level; that from the date of said agreement to February 1, 1885, the said Hiram Witherbee in his life-time, and the defendants since his decease, paid to said Crawford, Mills & Co., or to said plaintiffs, all rents which accrued to them under and by virtue of said agreement, but since that time the defendants have paid none of the same; that since that time the defendants have received and retained, as the proceeds of the sale by them of one eighth of the ores raised and mined on said lands lying south of an east and west line drawn across the northern end of said level, the sum of $670.21, no part of which has been paid to or received by the plaintiffs; that all of said ores were mined and raised from said lands without hindrance, impediment, increase of cost, or trouble by reason of water therein, and most, if not all of them, were so mined and raised from below the water-level therein before the construction of said level, and above the present water-level in said lands.

The court further found that the level was somewhat out of repair, but that there is a continuous underflow through each of its shafts, and that at least two thirds as much water pours out of the mouth of said level as it ever discharged since its construction, and that the said Hiram Witherbee in his life-time, as late as August 2, 1866, by a certain supplemental agreement, approved and applauded the manner in which said level had been built, down to that time, and the energy with which the work of constructing it had been pushed. These findings appear to have been justified and supported by the evidence.

1. The learned counsel of the appellants contend that the defendants are discharged from the obligation to render such one-eighth of the mineral to the plaintiffs, because the

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level or drain was so badly out of repair when it was raised or mined. It does not appear that the defendants were at all injured or prejudiced by any want of repair of the level, if there was any, or that they were at all troubled by water in their mines. The agreement for the construction of the level is silent as to the depth it should be excavated. It only requires the level to be so constructed as to drain or uncover the lead ore so as to permit it to be raised or mined without any trouble or inconvenience from water. Filled up to some extent, as it may be, the level seems to be yet deep enough for all practical purposes, and the defendants have no cause of complaint. It follows, therefore, that the question as to whether the plaintiffs are bound to keep the level in repair, or to what extent they are so bound, is not raised.

2. The point made that the will of Jefferson Crawford was not sufficiently authenticated or proved to be admitted in evidence can hardly prevail,—(1) Because the objection was not specific, that it was not properly authenticated. The objection was that the will was immaterial and incompetent for any purpose. (2) Because the defendants introduced in evidence a notice signed by one of them, dated December 8, 1884, by which the plaintiffs were notified to repair said level in compliance with said original agreement, and that they should withhold the rents until it should be restored to its original usefulness. This notice is an admission that the plaintiffs are the proper parties as successors of Crawford, Mills & Co. in the title, and bound by the agreement. This cured any error that might have been committed in improperly receiving the will in evidence.

The main and important question in the case is whether the covenant sued upon "runs with the land." On that question, the learned counsel on both sides have submitted unusually able arguments and briefs. We may not follow the learned counsel through their able reasoning and well-

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selected authorities, but it will not be from any want of appreciation for their professional labor. It appears to us that the covenant to render one eighth of the mineral to the covenantees, read in connection with the dependent covenant to construct the level for the purpose of making the lead ore in the land available, and the grant of one eighth of such ore in the land, comes within every essential element of one that runs with the land and binds the present parties. (1) There is an estate granted. (2) The performance or non-performance of the covenant affects the nature or value of the property conveyed. (3) There is a privity of estate between the contracting parties. Platt, Cov. 461. One eighth of the mineral is granted or conveyed. While the mineral is in the earth, undiscovered and unmined, it has but little or no value. The covenant requiring the grantor to raise or mine and deliver it to the grantees, gives it value. There is not only privity of estate, but the parties are tenants in common of all the mineral in the land. The covenantees own one undivided eighth of it, and the covenantor reserved and owns seven eighths of it, and covenants to raise, separate, and deliver the one eighth. The possession of the undivided mineral in the land, by the covenant, remains in the covenantor until it is raised, divided, and delivered. The grant without the covenant would make each party liable to contribute a proportionate share of the labor and expense of raising or mining it. *Clark v. Plummer*, 31 Wis. 442. The covenant imposes this burthen wholly upon the grantor or the owner of the seven-eighths share. In that it also affects the quality and nature of the estate granted. The grant of the one eighth of the mineral in the land is a grant of an interest in the land and a part of the realty. *Golden v. Glock*, 57 Wis. 118; *Daniels v. Bailey*, 43 Wis. 566; *Young v. Lego*, 36 Wis. 394. Besides this, the grant with the covenant creates a charge upon the land to secure the mining and delivery of the one eighth, in the nature of a mortgage.

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If the grant and covenant together do not sufficiently show the real nature of the covenant, the dependent covenant of Crawford, Mills & Co. to construct the level or drain through and above the lands containing the mineral, for the sole purpose of making it possible to mine the lead ore in it, as the consideration of the covenant to raise and deliver the one eighth of it, will very clearly and conclusively show the latter covenant to be one that runs with the land. By that covenant, they are to construct, at vast expense, such a level as will remove the water from the lead deposits so that they may be mined with facility; and thereby give to the mineral in the land almost, if not quite, its entire value, and make it possible to deliver the one eighth, and to secure the seven eighths of it to the covenantor. Both parties are interested proportionably in and dependent upon that great and common improvement for the value of their respective shares of the mineral. It is the common source of their beneficial interest in the land. As long as the level drains the mineral deposits, each party may make available his interest in the land; and when it fails to so drain the lands, both parties will lose that interest. Suppose that agreement had provided that each party should bear their proportion of the expense of constructing the level and keeping it in repair, so that their respective shares of mineral could be raised, would not such a covenant run with the estate granted to Crawford, Mills & Co.? If so, then it follows that the covenant of Hiram Witherbee, to raise and deliver to them one eighth of the mineral granted, is such a covenant, for they would be mutual and dependent covenants in such a case, and if one runs with the land the other would also.

In *Wooliscroft v. Norton*, 15 Wis. 198, the owner of the dam and water-power deeded to another certain square inches of water to be furnished from the dam, and the grantee covenanted to pay his ratable share of the expenses

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of keeping in repair the dam and race-way in proportion to the number of square inches of water by him owned. It was held that such covenant ran with the estate granted and was binding upon subsequent owners. How much more the covenant under consideration. It is not only incident to the property conveyed and affects its value, but it lies directly on the estate granted, is inseparable from it, as its subject, and rests upon the same consideration. It is precisely the same as it would be if it was a covenant in the deed granting the one eighth, imposing upon the grantor the duty or burthen to raise and deliver the mineral granted. That case certainly rules this in principle, and is conclusive of the question.

I regard this case as one of the strongest and most unquestionable to be found in the books of a covenant running with the land. It is like a covenant in a deed to let the grantee into possession of the premises at once, or at a future time. It is necessary to make the grant available.

The covenant in *Spencer's Case*, 1 Smith, Lead. Cas. 145, was that the lessee should build a wall on the demised premises. The sixth point resolved in that case was, if the lessee covenant to repair the houses during the term, it shall run with the land. The reasons given were that, if it was not so, great injustice would be done to the lessor, and that reason requires that they who shall take benefit of a covenant should be bound by it. These reasons apply with great force here. The covenantees would lose all benefit from the construction of the level, and the grantor and covenantor would have all the advantages of the covenant that secured the construction of it, and it would be the greatest injustice to the covenantee. The principle seems to be, in these cases, that something is to be done on the land or estate granted, which is the case here. The case is put of a covenant to cultivate the lands demised in a particular manner. *Cockson v. Cock*, Cro. Jac. 125, and many other cases in point

with this case. In *Norman v. Wells*, 17 Wend. 146, the covenant was by the lessor that he would not let or establish any other mill on the same stream for sawing mahogany. It affected the value of the demised premises, and, in the case put by Judge Cowen, the covenant of the lessor was to repair the demised premises. *Lattimer v. Livermore*, 72 N. Y. 174; *Astor v. Miller*, 2 Paige, 68; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Thomas' Adm'rs v. Von Kapff's Ex'rs*, 6 Gill & J. 372; *Hurst v. Rodney*, 1 Wash. C. C. 375; *Worthington v. Hewes*, 19 Ohio St. 66. These and other cases cited in the brief of the respondent's counsel establish the same principles of this case. But none of them present so many reasons for the rule as this case. It would be useless to refer to more authorities upon a question on which so much learning and research have been expended. Every case must be brought to the test of the few general principles above stated, and the question can be more satisfactorily determined in that way than by a multiplicity of adjudicated cases, more or less remote in their facts.

The authorities cited by the learned counsel of the appellant appear to be quite inapplicable. The intention of the parties, if it can be ascertained from the agreement, should have weight in cases of doubt, and in this agreement the parties have repeated, in every form, clauses to bind their heirs and assigns, and specifically stipulated that this covenant should "run with the land." But this is no doubtful case. We think the learned circuit court decided the question correctly, and held the present parties liable on the covenant to raise and render the one eighth of the ore granted, and especially to pay for that share of the ore which they have already raised or mined and converted to their own use. We can find no error in the case.

By the Court.— The judgment of the circuit court is affirmed.

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THE WARDER, BUSHNELL & GLESSNER COMPANY, Appellant, vs. WHITISH, Respondent.

September 8 — September 23, 1890.

Contracts: Sale of chattels: Fraud: Instructions to jury.

1. The refusal to give an instruction as to the duty of a party if he had entered into a certain contract is not error where the jury found that he had not entered into such contract, and where the instruction was substantially given in the general charge, and the evidence was conclusive that such duty was performed.
2. One who has by fraud induced another to execute a contract cannot enforce it on the ground that the party so executing should have used greater care to avoid imposition.
3. If, by the terms of the sale, the purchaser of a machine is not bound to take it, after a trial, unless he chooses, he may reject it whether it is capable of doing good work or not.

APPEAL from the Circuit Court for *Grant* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an action to recover $135 and interest, the alleged purchase price of a certain Champion Light Binder manufactured by the plaintiff, and delivered to the defendant under an alleged written contract with a warranty annexed.

The answer denied the execution of any such contract, and alleged in effect that the agent of the plaintiff applied to the defendant to sell him such a machine, and upon the defendant's informing him that he had seen the plaintiff's machine and did not like it nor the manner in which it worked, said agent represented to the defendant that said binder had been much improved during the year previous; that it was much lighter, and made of steel; that two horses could easily work it, and it was not hard upon their necks; that it could be raised and lowered both at the bull-wheel and at the grain-wheel, and was so arranged that bundles could be bound large or small at pleasure, depending upon

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whether there were weeds or other green stuff in the grain; that said binders were as good as any other binder; that if the defendant would buy one he might take it and try it until he was satisfied, and that if it was not as they had represented, and he was not suited with it, he could return it at any time, and need not pay for it; that the defendant was induced by such representations to take one of the plaintiff's machines upon such terms; that thereupon said agent produced and asked the defendant to sign a paper which he then represented to the defendant as nothing more than an order for a machine upon the terms and conditions stated; that said agent did not read said paper to him; that the defendant is and was an illiterate person, incapable of reading or writing; that, relying upon such representations, he signed the paper, and received from the plaintiff a machine, July 19, 1888; that, upon trial under the supervision of plaintiff's agent, July 27, 1888, it was found not to be such a machine as represented by him, nor made of the materials represented, and that it would not operate as had been represented by him; that the defendant thereupon notified the agent of the plaintiff that he did not like the machine, and would not keep it; that said agent thereupon again tried said machine without being able to make it work as represented; that the defendant thereupon informed said agent that the machine was not such as he had ordered, and did not do good work, and that he would not keep it, and returned it. The answer further alleges that the machine was not as represented in the plaintiff's printed warranty, and did not comply with the terms thereof.

At the close of the trial the jury returned a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff appeals.

For the appellant there was a brief by *Clark & Taylor*, attorneys, and *Boyesen & Lawrence*, of counsel, and oral argument by *S. H. Taylor*. To the point that the court

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erred in refusing to instruct the jury that the defendant should have used reasonable care to prevent mistake or imposition by causing the order and warranty to be read to him by some one in whom he had confidence before signing, they cited *Bowers v. Thomas*, 62 Wis. 480, 484; *Taylor v. Fleckenstein*, 30 Fed. Rep. 99; *Keller v. Orr*, 106 Ind. 406; *McKinney v. Herrick*, 66 Iowa, 414; *Sanger v. Dun*, 47 Wis. 615; *Fuller v. Madison M. Ins. Co.* 36 id. 603; *Upton v. Tribilcock*, 91 U. S. 45; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Chapman v. Rose*, 56 N. Y. 137; *Grace v. Adams*, 100 Mass. 505; *Mamlock v. Fairbanks*, 46 Wis. 415; *Faucett v. Currier*, 109 Mass. 79; *Hawkins v. Hawkins*, 50 Cal. 560; 2 Kent's Comm. 484; Cooley on Torts, 488.

For the respondent there were briefs by *Ed. M. Lowry*, attorney, and *W. E. Carter*, of counsel, and oral argument by *Mr. Carter*.

CASSODAY, J. The finding of the jury in favor of the defendant is to the effect that he was induced to sign the written contract by the false representations of the plaintiff's agent, and that the real contract of purchase was in effect as alleged in the defendant's answer. There is evidence sufficient to support the verdict. It remains to be considered whether there were any errors upon the trial.

1. Error is assigned because the court refused to instruct that "if the jury *believes that the contract described in the complaint was entered into between the plaintiff and defendant*, the jury is instructed that it was the duty of the defendant to give the machine a second trial, in the presence of the company or its agent, before returning the same." By the terms of this instruction, the jury would only have been required to consider the same, in case they *believed* "that the contract described in the complaint was entered into between the plaintiff and the defendant." The verdict in favor of the defendant is conclusive that the jury never

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so believed, and hence, had the instruction been given, the jury would never have reached the point where, under such instruction, they would have been called upon to consider it. Besides, the court charged the jury, in effect, that if the defendant knowingly signed the alleged written contract, as claimed by the plaintiff, then the defendant was bound by the written contract, including the clause in respect to a second trial. The evidence is also conclusive that there were two trials of the machine under the supervision of the plaintiff's agent,— one in the forenoon, and one in the afternoon; that the result of such two trials was that the agent promised to send an expert for another trial, but that no expert came until after the defendant had bought another machine and was in the act of returning the one in question. Under these circumstances there seems to have been no error in rejecting the instruction.

For the reasons given, the court was justified in refusing to give the second instruction assigned as error, respecting such second trial of the machine.[1]

2. Error is assigned because the court refused to charge the jury that, "the court instructs you that the defendant, *John Whitish*, should have used reasonable care to prevent mistake or imposition by causing the order and warranty to be read to him by some one in whom he had confidence, before signing." This is not the case of a party, in the absence of fraud or mistake, failing to know the contents of a written instrument signed by himself by reason of his own negligence or want of reasonable care, as in the cases cited by the learned counsel for the plaintiff and many others which might be cited, as, for instance, *Herbst v. Lowe*, 65 Wis. 316, where the distinction between those cases and cases like this is pointed out. Certainly no one will con-

[1] This instruction was as follows: "The jury is instructed that the trial of the machine the day it was put up cannot be construed as subjecting it to such a second trial as was contemplated in the warranty." — REP.

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tend that a person can procure the signature of a party to a contract by false representations, and then enforce the contract on the ground that, had the party so deceived been more vigilant, he would have discovered the fraud in time to have withheld his signature from the contract. In other words, a person cannot procure a contract in his favor by fraud, and then bar a defense to it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him.

3. Exception is taken because the court in effect charged the jury that if the oral contract was that the defendant should not be obliged to take the machine on the trial of it unless he chose to do so, then he might reject it whether it was capable of doing good work or not. This charge was simply to the effect that such was the rule in case such was the contract. This ruling is sustained by the repeated decisions of this court. *Exhaust Ventilator Co. v. C., M. & St. P. R. Co.* 66 Wis. 218; *S. C.* 69 Wis. 454; *Bayley v. Anderson*, 71 Wis. 420. See, also, *Silsby Mfg. Co. v. Chico*, 24 Fed. Rep. 893. Besides, it is undisputed that two trials of the machine were made in good faith under the supervision of the plaintiff's agent, and it is virtually conceded that its work was unsatisfactory, otherwise the agent would not have sent for an expert to give it another trial.

There seems to be no material error in the record. The questions involved are familiar to the profession, and further discussion is unnecessary. The jury having determined all controverted facts in favor of the defendant and against the plaintiff, there is no escape from the conclusion reached.

By the Court.— The judgment of the circuit court is affirmed.

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BUSHNELL, Respondent, vs. BUSHNELL and another, Appellants.

BUSHNELL, Appellant, vs. BUSHNELL and another, Respondents.

September 8 — September 23, 1890.

Suretyship: Contribution: Partial payments: Limitation of actions: Application of payments: Interest.

1. Each payment by a surety in excess of his proportion of the debt gives a right of action for contribution, and the statute of limitations begins to run from the date of each such payment.
2. An action at law for contribution is limited to six years from the time when the cause of action accrued, although an equitable action might have been brought within ten years.
3. Where the value of property and money received by a surety from the principal debtor was less than the amount of payments made by such surety in excess of his proportion of the debt, as to which payments an action for contribution was barred, it was proper to apply such property and money upon said payments and not upon a subsequent payment as to which the right of action for contribution was not barred.
4. In an action by a surety for contribution only the legal rate of interest upon the amount recovered should be allowed, even though the debt paid by the plaintiff bore a higher rate.

APPEALS from the Circuit Court for *La Fayette* County.

Action by a surety for contribution. The plaintiff's co-surety, the defendant *Elijah D. Bushnell*, is an insane person, and the defendant *Olmsted* is his guardian. Other facts are stated in the opinion. The plaintiff recovered $98 and interest thereon at ten per cent. per annum from January 29, 1880. Both parties appeal from the judgment.

For the plaintiff there was a brief by *Bushnell & Watkins*, and oral argument by *A. R. Bushnell.*

For the defendants there was a brief by *Orton & Osborn*, and oral argument by *P. A. Orton.*

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COLE, C. J. This is an action by a paying surety against a co-surety for contribution. Cross-appeals from the judgment were taken, and the questions arising will be considered without special reference to the case to which they relate. The main question is presented on the finding of the court below that the plaintiff is the owner and holder of the note mentioned in the evidence, which was signed by the parties to the action as sureties for their brother, Levi N. The note drew interest at the rate of ten per cent., and several payments were made upon it from time to time by the plaintiff. As to these payments the six years bar of the statute of limitations was interposed, which the court sustained as to all payments except the one for $98, made January 29, 1880. As to that payment the circuit court held the plaintiff was entitled to recover the full amount thereof, with ten per cent. interest from the time it was paid, and that the action was barred as to the other payments.

The first question which will be considered is, Was the six years statute of limitations applicable to the first six payments made upon the note by the plaintiff? It is said by defendants' counsel that this action for contribution between sureties is founded upon an implied contract to contribute, and that a right of action accrues against the co-surety on each separate payment when made, when it is more than the equal share of the debt which the paying surety is bound to pay; and he says the case comes strictly within the limitation of subd. 3, sec. 4222, R. S., which bars an action upon an obligation or liability, express or implied, in six years, except those mentioned in the last two preceding sections. The decision of the questions presented is clear upon the authorities. Says Mr. Justice Story: "Originally it seems to have been questioned whether contribution between sureties, unless founded upon some positive contract between them incurring such liability, was a matter capa-

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ble of being enforced at law. But there is now no doubt that it may be enforced at law as well as in equity, although no such contract exists. And it matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the same identical debt." 1 Story, Eq. Jur. § 495. In *Davies v. Humphreys*, 6 Mees. & W. 153, Baron PARKE says the action for contribution arises upon a principle of equity, though it is now established to be the foundation of an action at law, and this is generally the language of the cases upon the subject.

The result of this view would seem to be, that the plaintiff's right of action upon the liability of the co-surety is limited to the six years from the time he pays the creditor more than his proportion of the debt. Angell thus states the rule, and such is the doctrine of the adjudications. Ang. Lim. § 131 *et seq.; Davies v. Humphreys, supra; Scott v. Nichols*, 61 Am. Dec. 503, and authorities referred to in the note. Where a note payable by instalments is paid by a surety, the statute begins to run against him from the time he pays each instalment. *Bullock v. Campbell*, 9 Gill, 182. It seems to be clearly established that, where a surety has paid more than his share of the debt, every such payment gives a right of action for contribution, and, as a matter of course, the six years statute begins to run upon it.

But it is said that the case comes within the ten years limitation provided for in subd. 4, sec. 4221, R. S. That, in effect, makes actions cognizable in a court of chancery, where no other limitation is prescribed in the chapter, subject to that period of limitation. In answer to this suggestion, we observe that this is a plain action at law, in which a judgment for a specified sum is demanded. This is the only relief or matter asked for in the action. The statute

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in respect to a legal action applies to it. These statutes are clear and explicit, and bar an action founded upon an obligation or liability, express or implied, which is not brought within six years from the time the right of action accrues. It is said that a court of equity would take jurisdiction to enforce contribution, therefore the limitation of subd. 4, sec. 4221, applies. Whether this position is sound or not we shall not determine. It is sufficient now to say that this is not an equitable suit to enforce contribution, and no equitable relief is sought. It is a legal action to recover money paid to the use of the defendant, and stands upon the same footing as any other action founded upon an implied contract.

The plaintiff paid the greater portion of the note, indeed, much more than his share. The principal debtor paid the plaintiff some money, and transferred to him some property. The court applied these several payments and the value of the property to reimburse the plaintiff for the excess he had paid more than his share. We see no error nor injustice in such an application. The aggregate of these payments, increased by the value of the property, is much less than the amount the plaintiff has paid for his co-surety. It is therefore proper not to require the plaintiff to account for them under the circumstances.

It was also correct to give the plaintiff judgment for the amount of the last payment, for, as we have said, he had already paid largely in excess of his proportion, and, if the defendant pays the entire amount of the last payment made on the note, he will still fall short of paying his share of the debt. But there is an error in giving interest on the last payment exceeding seven per cent. Interest at ten per cent. was given, doubtless because the note drew interest at that rate. But the recovery is upon an implied contract for money paid to the defendants' use, and not upon the note nor upon the guardian's bond. The note and bond are paid

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and extinguished. The rate of interest on the amount of the recovery should be the legal rate, and no more. The counsel for defendant claims that there was not $98 due on the note when the last payment was made. We have made no computation, and shall not. The plaintiff is entitled to recover only what was due when the note was discharged, with legal interest on the same. The circuit court will enter judgment for the proper amount, as indicated in this opinion.

By the Court.— The judgment on the plaintiff's appeal is affirmed, and it is reversed on the defendants' appeal, and the cause is remanded to the circuit court for the entry of proper judgment.

DICKSON, Respondent, vs. FIELD, Appellant.
DICKSON, Appellant, vs. FIELD, Respondent.

September 8 — September 23, 1890.

Wills: Construction of devise: Condition for support of devisee's sister: Demand: Waiver.

1. A devise of a farm to the testator's son, "conditioned said son shall support and maintain my daughter Alice out of said property . . . during her natural life," does not require the daughter to live upon the farm in order to entitle her to such support.
2. Such condition does not require the son to pay a cash annuity to the daughter, but to deliver to her, upon the farm, specific articles necessary to her maintenance.
3. No formal demand was necessary to charge the son with such obligation. His failure to inform the daughter of his readiness to furnish such support puts him in default and renders him liable to pay a cash commutation for past support from the time she became entitled to the same, but does not entitle her to a cash annuity for life.
4. The daughter being married when the devisee came into possession of the farm, her subsequent receipt of maintenance from her husband was a waiver of her right to look to the devisee therefor; but his obligation revived upon her husband's death.

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APPEALS from the Circuit Court for *La Fayette* County.

The parties are sister and brother. Their father, William Field, late of La Fayette county, died testate in May, 1858, leaving surviving him his widow and eleven children. His estate consisted chiefly of lands in various localities, appraised at $13,345. His personal estate was appraised at $1,569. The estate was indebted in the sum of $862, which was paid out of the proceeds of the personal property. By his last will and testament, William Field devised specific real estate to each of his children, except his daughter *Alice*, the plaintiff. He devised his homestead farm, consisting of 143½ acres, now worth about $45 per acre, to his widow, for life, together with the use of all his personal estate except one horse; and to his son *Silas D.*, the defendant, he devised the same property upon the decease of his widow, "conditioned said son shall support and maintain my daughter *Alice* out of said property, above described, during her natural life."

When their father died, *Alice* was twelve and *Silas* three years old. By reason of an injury which she received when five or six years old, or because of constitutional tendencies, probably both, *Alice* was afflicted with a disease in one of her hips, which resulted in shortening the limb about twelve inches, and rendering her a cripple for life. She resided with her mother on the homstead farm until she was about nineteen years of age, when she left home, and has not resided there since. In 1881, she married one Samuel Dickson, by whom she has two children, one born in 1882, the other in 1886. Dickson died April 22, 1888, leaving a little property, but which is insufficient for the support of his widow.

The widow of William Field occupied the homestead farm until September, 1887, when she died, and *Silas* thereupon went into possession thereof under the will, and has ever

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since occupied it as owner. At that time little or none of the personal estate remained.

Prior to the commencement of this action, *Alice* never demanded her support of *Silas*, and he did not, before that time, offer to support her. In his answer, however, he does offer to support her if she will make her home with him on the homestead farm and conduct herself properly. In his testimony, given on the trial, he says: "I am now willing to furnish her a home and support her there on the farm. I have been willing so to do always since mother's death." He also testified that he was not willing to support her children. *Alice* resides at Beetown, in Grant county, and *Silas*, with his wife and children, on the land thus devised to him, which is probably forty or fifty miles from Beetown.

This action was commenced March 22, 1889. It is an equitable action, brought to charge the homestead farm with the support and maintenance of the plaintiff, to compel the defendant to perform the conditions of the devise to him, in her favor, in their father's will. A sale of the land, the appointment of a receiver, etc., is demanded.

The circuit judge substantially found the facts above stated, and also found that the plaintiff is dependent for her maintenance and support upon the above-mentioned provision for her in her father's will, and has been thus dependent since May 1, 1888,— or from about the time her husband died; that an economical estimate of the cost of her maintenance per year, in health, is $200; and that, because of ill feeling manifestly existing between the parties, it is incompatible with her peace and comfort, and her duty as a mother, to reside in defendant's home and receive her maintenance there.

The judge also found, as conclusions of law, that it was and is the duty of defendant to support and maintain the plaintiff from the time she became dependent, and while she

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continues so; that it is not a condition of her receiving support and maintenance that she should reside with defendant upon the homestead farm; that the defendant should pay her at the rate of $200 per annum for such support and maintenance from May 1, 1888, to the trial of the action, to wit, December, 1889; that she is entitled to judgment for that amount and costs chargeable upon the homestead farm, and for which execution should be awarded; and that, to prevent a multiplicity of suits, the judgment should direct that the defendant pay to the plaintiff, or to the clerk of the court for her use, from and after December 1, 1889, the sum of $200 per year in quarterly payments of $50 each during the life of the plaintiff — all said sums being also a charge upon the homestead farm — for which the plaintiff may have execution. Also, that the judgment should provide that, in case of failure to pay any of such quarterly instalments, the plaintiff may move, on the foot of such judgment, for further appropriate relief. In case the plaintiff should cease to be dependent upon the provisions of her father's will for her support, it was directed that the judgment provide that the defendant have leave to apply to the court to be released from further payments, but the question whether he would be entitled to such relief is reserved; and further, if by reason of sickness or like disability, the allowance above mentioned shall become inadequate for her maintenance, the plaintiff may in like manner apply to the court to increase it. Judgment was ordered accordingly, and was afterwards entered pursuant to the above conclusions of law.

The defendant appeals from the whole judgment. The plaintiff appeals from that part of it which provides that her allowance shall commence May 1, 1888, instead of September, 1887, when the title to the homestead farm vested in the defendant.

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For the plaintiff there was a brief by *Joseph Bock* and *Bushnell & Watkins*, and oral argument by *A. R. Bushnell.*

For the defendant there was a brief by *Orton & Osborn*, and oral argument by *P. A. Orton.*

LYON, J. I. The judgment of the circuit court herein, so far as it is adverse to *Silas D. Field*, the defendant, rests upon the propositions (1) that *Alice Dickson*, the plaintiff, is not required to live with *Silas* on the homestead farm to entitle her to the support provided for her in the will of her father; (2) that, although *Alice* did not, before this action was commenced, request *Silas* to support her, yet his failure to do so was a permanent breach of the condition in the will in favor of *Alice* upon which the homestead farm was devised to him, entitling her to demand the cost of her maintenance in cash; (3) that the money value of such support has heretofore been, and while the plaintiff continues in health will continue to be, $200 per annum; and (4) that *Silas* must pay her that sum in cash annually during her life, unless the court shall thereafter relieve him therefrom, and a larger sum should the court so order in case of her sickness or like disability. Whether these are or are not correct propositions of law are the questions to be determined on the appeal of the defendant.

1. Is the condition of the devise to *Silas* of the homestead farm to be construed as requiring *Alice* to live with him on such farm as a condition precedent to her right to support and the obligation of *Silas* to support her? The condition of the devise is expressed in the will thus: "Conditioned said son [*Silas D.*] shall support and maintain my daughter *Alice* out of said property, above described, during her natural life." This clause provides in general terms for the support and maintenance of *Alice* out of the homestead farm, which we understand to mean that the homestead farm shall be charged with her maintenance, and perhaps

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that she should be supported out of the products thereof, but has no reference to the place where she shall reside. The clause contains no provision requiring *Alice* to live on the land devised to *Silas*, or in his family, or at any other specified place. Neither is there anything in the surrounding circumstances, as they existed when William Field died (in so far as such circumstances are disclosed by the testimony preserved in the bill of exceptions), which will authorize the court to say that he intended any such restriction upon the right of *Alice* to a support out of the farm. We are not informed whether the father thought *Alice* would die young or live to old age, whether she would marry or remain single, or whether she would be a helpless invalid or able to labor and care for herself. His opinion on these subjects is a matter of mere conjecture. Moreover, his devises to all his other children were unconditional and absolute. Why should he impose a restriction, or, rather, why should it be conjectured that he intended a restriction which he did not express, upon the enjoyment by *Alice* of the only provision made for her in his will, except an interest in certain rents, from which she realized $64 only? It could not have escaped his thought that the changing circumstances of his family might, in after years, render it improper that she should reside with *Silas*, and unjust and cruel to require her to do so. To adopt the construction contended for by the learned counsel for the defendant, the court will be compelled to read the sentence "out of said property above described" thus: "Out of *and upon* said property," etc. In view of the plain language of the provision in question, yet at the same time giving due weight to what may reasonably be supposed to have been the intention of the testator, we do not feel authorized to make this interpolation. The provision must be construed, just as it reads, as giving *Alice* the absolute right to her maintenance out of the homestead farm, without restriction as

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to the place of her residence. The learned circuit judge negatived the existence of such restriction. Of course there is no obligation upon *Silas* to contribute directly or indirectly to the support of the children of *Alice*, and none is claimed.

2. The condition of the devise to *Silas* does not require him to pay *Alice* a cash annuity, or cash sufficient for her maintenance. Had the testator intended cash payments, he would have expressed such intention in very different language. It is scarcely controverted, however, that in the first instance *Silas* might have discharged his obligation to *Alice* by delivering to her specific articles necessary to her maintenance, having due regard to the condition in life of the testator and his family when he died. And it is but reasonable and just to hold that he may deliver the same on the homestead farm, and cannot be required to deliver them elsewhere.

Although *Alice* made no formal demand of such necessaries at the farm or elsewhere, yet, presumably, *Silas* must have known she was living; that her husband was dead; and that he (*Silas*) was under obligations to furnish her the means of support. He should have informed her of his readiness to do so. This he failed to do, and his failure puts him in default, and renders him liable to pay a cash commutation for her past support. *Bogie v. Bogie*, 41 Wis. 209, 220. The case of *Dodge v. Benedict*, 59 Vt. 651, is cited by counsel for defendant to sustain the opposite doctrine. It is not in point, because the covenant there under consideration expressly provided the place where the covenantees should be supported, and the covenantor was held not bound to support them elsewhere. But counsel rely chiefly on *Jenkins v. Stetson*, 9 Allen, 128, to sustain their position. In that case, the plaintiff covenanted to support one Polly Gurney for life, in consideration of her bond to devise to him certain property. He supported her on his

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own farm seventeen years, when, for the purpose of avoiding her agreement to devise such property to the plaintiff, she left the farm and made a similar agreement with another, to whose wife she devised the property pursuant to such agreement. She died five years later. The plaintiff brought the action against the executor of Polly on her bond. After Polly left the farm he asked her to return but made no offer to and did not support her further. The court held that, under the circumstances of the case, Polly had waived any further support by the plaintiff, and that such failure further to support her was no breach of the plaintiff's covenant in that behalf. Clearly that case is not an authority here. We hold, therefore, that in the present case no formal demand of support was necessary to charge *Silas* with the obligation of performing the condition of the will.

But we are not prepared to hold that such failure puts *Silas* in default during the life of *Alice*, and entitles her to a cash annuity for life. Nothing short of an absolute refusal or neglect to support her, after his obligation to do so and the manner of doing it has been authoritatively adjudicated, should work that result. Hence, we conclude that *Alice* is entitled to recover in this action only the reasonable expenses of her maintenance, from the time hereinafter indicated to the date of the judgment to be hereafter entered.

3. The testimony preserved in the record supports the finding that such reasonable expense amounted to $200 per annum.

4. We think the leave to apply to the court to relieve *Silas* from the payment of the quarterly instalments, or to increase allowances in certain instances, have no proper place in the judgment, and should be omitted therefrom.

It follows that on the appeal of the defendant the judgment in its present form cannot be upheld.

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II. The appeal of the plaintiff presents the single question whether the obligation of *Silas* to support and maintain *Alice* commenced at his mother's death, in September, 1887, when title to the homestead farm vested in him, or May 1, 1888, which was about the time *Alice's* husband died. The circuit court held it commenced at the latter date. It has already been said that the failure of *Alice* to demand her support did not release *Silas* from his liability to furnish it. But it was competent for *Alice* to waive her right to it, as was held in *Jenkins v. Stetson*, 9 Allen, 128. While her husband lived, it was his duty, under the law, to maintain her. At the same time it was the duty of *Silas* to do so under his father's will. She could elect upon which of them she would cast the burden. She received her maintenance from her husband, and thus elected to look to him for it, instead of *Silas*. This was a waiver by her of the obligation of *Silas* until the death of her husband, which revived the obligation. We think the court did not err in computing the cost of her support from May 1, 1888.

In view of the relationship of the parties, and the manifest difficulty of determining precisely the rights of the plaintiff and the corresponding obligations of the defendant in respect to the kinds and quantities of articles he should furnish for her support, we are constrained to say that there should be no further litigation between these parties over the provisions in the will of their father. *Silas* should inform his sister at once that he will deliver to her, at his homestead farm or some other place they may agree upon, all articles necessary for her support, in suitable quantities, and, if they cannot agree upon such articles and quantities, they will be wise if they submit the controversy to the judgment of discreet mutual friends. It will be better still if they can agree upon a cash annuity in place of the specific necessaries.

The charge upon the estate of *Silas* in favor of *Alice*, cre-

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ated by the will of their father, may be a burdensome one. But it was created by the owner of the estate, who had the undoubted right, when he devised it, to impose any lawful charge upon it, even though it might destroy or largely impair the value of the estate of the devisee. The courts are powerless to relieve against it.

By the Court.— On the appeal of the plaintiff, the judgment of the circuit court is affirmed. On the appeal of the defendant, such judgment is reversed, and the cause will be remanded with directions to that court to render judgment for the plaintiff as indicated in this opinion.

THE STATE, Appellant, vs. GROVE and another, Respondents.

September 9 — September 23, 1890.

Penalties: Collection by civil action.

1. The penalty for the first offense under sec. 3, ch. 248, Laws of 1879, relating to adulteration and fraud in foods, etc., may be collected in a civil action by the state. Such first offense is not a misdemeanor, nor the penalty a fine, within the meaning of sec. 3294, R. S.
2. An act or omission "specially declared by law to be a misdemeanor," within the meaning of sec. 3294, R. S., is one so declared by statute.
3. Under sec. 3294, R. S., a penalty, forfeiture, or fine may be collected in a civil action unless the act or omission punishable thereby is also punishable, in the discretion of the court, by imprisonment either with or without the fine, or is specially declared by statute to be a misdemeanor, or, possibly, unless a statute prescribes that the offense be punished by fine *eo nomine* without further direction.

APPEAL from the Circuit Court for *Dane* County.

The case is stated in the opinion.

The *Attorney General* and *L. K. Luse*, Assistant Attorney General, for the appellant.

For the respondents therewas brief by *Lewis, Pfund & Briggs*, and oral argument by *H. M. Lewis*. They contended.

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inter alia, that the history of the legislation in this state upon the subject indicates an intention to restrict the right to enforce a forfeiture by civil action to those cases where the word forfeiture is used in specifying the penalty to be imposed, or where by manifest implication a forfeiture was intended,— as in sec. 1326, R. S., relating to obstructions to highways. But where the punishment is by fine *eo nomine*, or where by manifest implication a fine is meant, the proceedings should be by criminal information or indictment. R. S. 1849, ch. 122, secs. 1, 8, 9; R. S. 1858, ch. 155, secs. 1, 8; R. S. 1878, sec. 3294; *Oshkosh v. Schwartz*, 55 Wis. 489; *State ex rel. Guenther v. Miles*, 52 id. 490; Bouvier, Law Dict. tit. FINE. The intent of the legislature as to the grade of the offenses created by ch. 248, Laws of 1879, should be derived from sec. 1, where the penalty is called a fine. See 1 Dwarris on Stat. 664–5. The offenses prohibited are all of a similar nature, and it would be an absurd construction to say that, while the punishment prescribed by sec. 3 is ten times greater than that prescribed by secs. 1 and 2, it was intended to make the offense one of a lower criminal grade. If a recovery should be had in this case, would not the clear proceeds go to the school fund, as well as the proceeds of a recovery under secs. 1 and 2? If so, then the penalty is a fine within the meaning of the last clause of sec. 3294, R. S. *State ex rel. Guenther v. Miles*, 52 Wis. 490. The word misdemeanor, as used in sec. 3294, refers to common-law as well as statutory misdemeanors. *Oshkosh v. Schwartz*, 55 Wis. 488; Endlich, Interp. of Stats. 98–100, sec. 75. The offense charged in the complaint was a misdemeanor at common law. Bouvier, Law Dict. tit. CHEATS, MISDEMEANORS; 1 Bish. Crim. Law, 571, 585, 623; 2 id. secs. 143 *et seq.*

TAYLOR, J. This is a civil action commenced by the state against the respondents to recover the penalty prescribed

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in sec. 3, ch. 248, Laws of 1879. The action was commenced under the provisions of sec. 3294, R. S. 1878. This section reads as follows: "In all cases not otherwise specially provided for by law, where a forfeiture shall be incurred by any person, and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by a fine and imprisonment, or by fine or imprisonment, or is specially declared by law to be a misdemeanor, it shall be deemed to be a misdemeanor within this chapter. The word forfeiture, as used in this chapter, shall include any penalty in money or goods other than a fine." Sec. 3, ch. 248, Laws of 1879, reads as follows: "Every person who shall compound or put up for sale any food, drug, or liquor in casks, boxes, bottles, or packages, with any label, mark, or device whatever so as, and with intent, to mislead or deceive as to the true name, nature, kind, and quality thereof, shall be liable to a penalty of not to exceed five hundred dollars for the first offense, and for every offense after the first offense shall be punished by imprisonment in the state prison for not less than one year nor more than ten years." Sec. 3295, R. S., provides that the civil action for a forfeiture shall be brought in the name of the state as plaintiff.

In the circuit court the respondents demurred to the complaint of the state on the ground that it did not state facts sufficient to constitute a cause of action. The circuit judge sustained the demurrer, and from the order sustaining such demurrer the state appealed to this court. The ground upon which the demurrer was sustained by the circuit court is that no civil action will lie to recover the penalty prescribed by said sec. 3, ch. 248, Laws of 1879, and this is the only ground insisted upon by the learned counsel for the respondents in their argument in this court.

We think it is very clear that the penalty prescribed by

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said sec. 3, ch. 248, Laws of 1879, is not a *fine* within the meaning of the last clause of sec. 3294, R. S. It is also very clear that the section does not in express terms declare the offense to be a misdemeanor. This section, as well as the old section which received a construction by this court in *State v. Hayden*, 32 Wis. 663, expressly declares what shall constitute an offense a misdemeanor so as to prevent the bringing of a civil action for the recovery of a forfeiture or penalty. That the word "forfeiture" used in the commencement of the section is to be held to mean "penalty" in certain cases is clear. The last clause of the section defines the word "forfeiture" as used in the section as including "any penalties in money or goods other than a fine." The section authorizes a civil action to recover the forfeiture or penalty incurred by any person as a punishment for any act or omission which is not a misdemeanor, and then goes on to define what shall be held a misdemeanor so as to deprive the state of the right to bring a civil action to recover such forfeiture or penalty; and it clearly provides that, to take away such right, such act or omission must be punishable by a fine and imprisonment, or by fine or imprisonment, or it must be specially declared by law to be a misdemeanor. The act for which the penalty is prescribed by said sec. 3, ch. 248, is not specially declared by law to be a misdemeanor for a first offense, and is not punishable by fine or imprisonment, or by fine and imprisonment, and is not taken out of the section above quoted, unless we are compelled to hold that the penalty prescribed is a "*fine*" within the meaning of the last clause of the section.

It is urged that the act punished is a misdemeanor at common law. We have very grave doubts upon that point, but if it were so we do not think it would be taken out of the statute, as we must construe the words "specially de-

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clared by law" to mean by the statute law of this state, and not by the common law of England. *State v. Hayden*, 32 Wis. 669.

In order to make the statute consistent with itself, and render it certain and intelligible, the word "fine" as used in the last clause must be construed to cover only cases where the statute imposes a fine in express words as a punishment for the offense, connected with the independent power to imprison as prescribed in the preceding part of the section, and not merely the power to imprison on failure of the offender to pay the fine. *State v. Smith*, 52 Wis. 134; *Oshkosh v. Schwartz*, 55 Wis. 483; *State v. Leaver*, 62 Wis. 387; *Platteville v. Bell*, 43 Wis. 488; *Chafin v. Waukesha Co.* 62 Wis. 463, 467; *Boscobel v. Bugbee*, 41 Wis. 59. In the last case, the ordinance expressly provided that the party violating the ordinance should be punished by a fine or imprisonment, and so it was held that the prosecution was in its nature a criminal action, and, although the city was the plaintiff, it could not appeal from the judgment.

In the case of *Chafin v. Waukesha Co.*, we held that when the court was simply authorized by the statute or ordinance to impose a fine, and in default of payment thereof to commit the offender to jail for not more than forty days nor less than three days, an action to recover such fine was a civil action. It is clear, therefore, that in order to prevent the bringing of a civil action to collect a penalty, forfeiture, or fine, the act or omission which is punished by such forfeiture, penalty, or fine, must also be punishable in the discretion of the court by imprisonment without the imposition of the forfeiture, penalty, or fine, or by such forfeiture, penalty, or fine and such imprisonment, in such discretion, or such offense must be specially declared by law to be a misdemeanor, either by the act creating the offense or by some other statute of the state. There may possibly be an

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exception to this rule, should there be a statute which prescribed that the offense be punished by a fine *eo nomine* without further direction. See sec. 4633, R. S. 1878.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

BAILEY, Respondent, vs. THE CHAMPLAIN MINING & PROSPECTING COMPANY and another, imp., Appellants.

September 9 — September 23, 1890.

Corporations: Increase of capital stock: Irregularities cured by acquiescence: Fraud: Cancellation of stock.

1. The owner of mines agreed with certain persons to form a corporation, they to put in $20,000, and he to put in the mines and to have one half of the stock issued. The $20,000 was furnished, and stock to that amount was issued to the parties furnishing it. By mistake the articles of incorporation fixed the whole capital stock at $20,000 instead of $40,000. To correct this mistake a resolution increasing the capital stock to $40,000 was adopted with the assent of all the stockholders. *Held*, that even if such resolution was adopted at a meeting of the directors instead of the stockholders, the assent and acquiescence of all the stockholders cured the irregularity; and the owner of the mines, having conveyed them to the corporation in execution of the original agreement, was entitled to certificates of stock to the amount of $20,000.
2. A court of equity may, in a suit by a stockholder, adjudge that stock issued by a corporation is void on the ground of fraud.

APPEAL from the Superior Court of *Milwaukee* County.

The facts are sufficiently stated in the opinion. The defendant corporation and the defendant *P. C. Clausen* appeal from the judgment in favor of the plaintiff.

For the appellants there was a brief by *Turner & Timlin*, and oral argument by *W. J. Turner*. They contended, *inter alia*, that the proceedings by which it was attempted to in-

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crease the capital stock in November, 1887, were not in conformity to the requirements of the statute. The meeting was a meeting of the *board of directors;* but the increase must be by the stockholders, not by the directors. Cook, Stock, sec. 285; *Finley S. & L. Co. v. Kurtz*, 34 Mich. 89; *Railway Co. v. Allerton*, 18 Wall. 233; *Scovill v. Thayer*, 105 U. S. 143; *Winters v. Armstrong*, 37 Fed. Rep. 508. All the parties are charged with knowledge that new stock could not be issued without being paid for; that the stock could not be increased except by the proceedings pointed out by the statute. *Crandall v. Lincoln*, 52 Conn. 73. As against the corporation, its corporate existence and standing cannot be modified except in compliance with the statute. As against the corporation itself, in matters affecting its existence, the doctrine of estoppel cannot be invoked. Under sec. 1761, R. S., a corporate meeting which had not been regularly called could be held only when preceded by written consent of all the stockholders upon the records.

The trial court has determined that this corporation, which was legally organized with a capital limited to $20,000, all of which had been regularly paid for, must consider its articles amended and issue to the plaintiff $20,000 worth of its capital stock, because, before it had corporate existence, there was an agreement between the promoters — only a portion of whom are at present stockholders — that one of them should have a half interest in the property. It enforces by its judgment the specific performance of a contract between the plaintiff, Iversen, and Todell, to which the corporation, *Clausen*, and Dorner were not parties. This is error. *Carmody v. Powers*, 60 Mich. 26; 1 Morawetz, Corp. secs. 434, 454; 2 id. secs. 681, 683, 761; *Wood v. Union G. C. B. Asso.* 63 Wis. 9; Cook, Stock, secs. 279, 281, 284; *Avery v. Ryan*, 74 Wis. 591.

It was also error to adjudge that the amendment in January, 1889, increasing the capital stock from $20,000 to

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$41,000 was void. The remedy to declare void the amendment is not in a court of equity at the suit of an individual stockholder. It is in an action at law by the state. 2 Morawetz, Corp. secs. 938, 1040, 1041; High, Ex. Leg. Rem. sec. 660; *Strong v. McCagg*, 55 Wis. 624.

For the respondent there was a brief by *Quarles, Spence & Quarles* and *Frank M. Hoyt*, and oral argument by *Charles Quarles*. They argued, among other things, that the meeting in November, 1887, at which the capital stock was increased from $20,000 to $40,000, though described as a *directors'* meeting, was in fact a *stockholders'* meeting, and is certified to have been such by the defendants Todell, as president, and Iversen, as secretary, in their certified copy of the resolution filed with the register of deeds. The directors comprised *all* the stockholders except F. C. Bailey, father of the plaintiff, who acquiesced in what was done at that meeting. And what was then done was acquiesced in by all until in January, 1889. If the resolution for the increase was passed, as is claimed, at a *directors'* meeting, this long-continued acquiescence by the stockholders would validate the act. Cook, Stock (2d ed.), 285; *Railway Co. v. Allerton*, 18 Wall. 236; *Scovill v. Thayer*, 105 U. S. 149; *Poole v. West Point B. & C. Asso.* 30 Fed. Rep. 513–515; *Kansas City H. Co. v. Harris*, 51 Mo. 464; *Kansas City H. Co. v. Hunt*, 57 id. 126.

The trial court does not attempt to enforce specific performance, against the corporation and stockholders, of the contract between plaintiff, Iversen & Todell. That contract was *executed*. It was in effect a contract to subscribe for the stock, and was completed by payment,—the defendants advancing the money and the plaintiff conveying his mine. The parties thereupon became *ipso facto* stockholders. *Tanner v. Gregory*, 71 Wis. 490. This relation may be established by parol. *Clark v. Farrington*, 11 Wis. 326; *Wyman v. Am. Powder Co.* 8 Cush. 168; Cook, Stock,

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sec. 52; *Chaffin v. Cummings*, 37 Me. 76, 83. The preliminary agreement when acted on, the company being incorporated and the capital increased to comply with it, constituted the parties stockholders according to the terms of the agreement. 1 Morawetz, Corp. secs. 47, 56; *Athol M. H. Co. v. Carey*, 116 Mass. 473; *Buffalo & J. R. Co. v. Gifford*, 87 N. Y. 295, 299; *Marseilles L. Co. v. Aldrich*, 86 Ill. 504; *Minneapolis T. M. Co. v. Davis*, 40 Minn. 110; *Smith v. N. A. Mining Co.* 1 Nev. 423.

In a suit by a stockholder the court will, when necessary, determine questions of the validity or invalidity of corporate acts and of instruments issued, or purporting to be issued, by the corporation, as collateral and incident to the main questions to be decided and the principal relief prayed. Cook, Stock (2d ed.), sec. 288, note 3; *Winters v. Armstrong*, 37 Fed. Rep. 508; *Scovill v. Thayer*, 105 U. S. 147; *Veeder v. Mudgett*, 95 N. Y. 310; *Sutherland v. Olcott*, id. 93; *Eidman v. Bowman*, 58 Ill. 444.

ORTON, J. Only a general statement of the facts of this case need be made, to understand the full import of the decision. It is essentially a case on the merits, and no questions of law are involved which cannot be disposed of on elementary principles, and there is nothing complicated about the case. The parties were at issue on the facts, and the superior court adopted the facts and theory of the plaintiff rather than that of the defendants. According to the evidence for the plaintiff, the individual defendants, with the exception of the defendant F. C. Bailey, attempted to commit a gross fraud on the plaintiff through the officers of the corporation. According to the complaint, the facts are substantially as follows:

Prior to March, 1887, the plaintiff had discovered and located two valuable gold mines in Atturas county, territory of Idaho,— one called the "Champlain Lode," and the other

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the "Alabama Lode,"—and owned the first-named lode, and owned the last-named lode with one Stride, and had an interest in a lode called the "Hattie Lode" with one Crippen. He was without the means to test, improve, and operate said mines, and he applied to the defendants Todell, Iverson, and Hansen, and proposed to them to form a stock corporation to test and develop the same, about the 19th day of March, 1887, and proposed to unite with them in forming such a corporation under the laws of this state. They acceded to his proposition, and furnished him at once with $1,000, to drive a shaft or tunnel to test said lodes. Being satisfied with such test and the prospect, they entered into articles of agreement by which they and their associates were to furnish the sum of $20,000, including said $1,000, as the cash working capital of the corporation to be formed, and the plaintiff was to receive for the property one half of the stock to be issued. The said $20,000 cash capital was so furnished, and stock of that amount was issued to the parties so furnishing it in their proper proportion. There was a mistake made in the articles filed to obtain such incorporation, by making the whole capital stock only $20,000, instead of $40,000, the amount necessary to give said parties their proper amount of stock for the money capital so furnished by them of $20,000, and to give the plaintiff his proper amount of stock for his property in said mines so to be conveyed to the corporation. The mines were developed by the use of said money, and they were found to be of very great value. To correct said mistake in the amount of the capital stock, and make it $40,000, instead of $20,000, a meeting of the stockholders was held about the 28th day of November, 1887, at which meeting the plaintiff was represented by proxy, and they unanimously voted to so amend and correct the articles of the corporation, and make the whole capital thereof the sum of $40,000, and a resolution to that effect was adopted, and

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the plaintiff supposed that said resolution so increasing the stock of the corporation was duly filed in the office of the secretary of state. The plaintiff was recognized by the defendants and other stockholders at said meeting as having and owning one half of the whole stock, and his vote for that amount, viz., the sum of $20,000, was duly received and counted; but his shares of said $40,000, amounting in the aggregate to the sum of $20,000, to which he was entitled for said property, have never been issued and delivered to him, and, on his demand of the same from the secretary of the corporation, it was refused. In January, 1889, the defendants and other stockholders called a meeting, without giving the plaintiff any notice thereof, and without his knowledge, at which, by a resolution, the capital stock of the corporation was increased to $41,000, and said resolution was recorded in the office of the register of deeds of Milwaukee county, and a copy thereof was filed in the office of the secretary of state. This is charged in the complaint as a conspiracy to cheat and defraud the plaintiff. In a short time thereafter the defendants proposed to the plaintiff that if he would consent to an increase of the capital stock to $60,000 he should receive, as one half of the stock as it was then fixed, the sum of $20,000, thus giving him $20,000 of stock, and taking to themselves stock to the amount of $40,000. The defendants and other stockholders, together with the president, secretary, and a majority of the directors of the corporation, conspiring to cheat and defraud the plaintiff, caused a mortgage on the property of the corporation to be made to one Landott, as trustee, to secure the bonds of the company of $10,000 to be thereafter issued, and to be recorded in the county where the mines are situated by an agent of Landott and the company, who had notice of the injunction in the case. None of the bonds secured by said mortgage have been issued, and no money through such source is needed by the company.

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The superior court found the foregoing facts to be substantially true, and, in accordance with the prayer of the complaint, adjudged that said last increase of the capital stock and the said mortgage were void, and that the plaintiff is entitled to stock at the par value of $20,000, and to have the president and secretary of the company issue to him certificates for said 2,000 shares of the stock thereof, as one half of the whole stock of $40,000. The evidence appears to have warranted such finding and judgment.

The learned counsel of the appellants contend that the court erred in holding that the capital stock was duly increased from $20,000 to $40,000, and such increase was made to conform to the original agreement. The fact that the defendants issued to themselves and other stockholders $20,000 in itself implies that the plaintiff should have an equal amount of stock for his property. The mistake was apparent on the face of the transaction, and it was corrected by the assent of all of the stockholders. It may have been corrected by the directors in form, but the directors were all shareholders, and they all assented to it and acquiesced in it. This cured any irregularity, if any, in increasing the stock. *Railway Co. v. Allerton*, 18 Wall. 233; *Scovill v. Thayer*, 105 U. S. 143; *Poole v. West Point B. & C. Asso.* 30 Fed. Rep. 513. The plaintiff was entitled to certificates of stock of $20,000, because such was the original agreement, and he deeded to the corporation the mines in execution of it on his part.

Some other technical objections to the judgment are made, based on the want of power in the court to change the stock in a corporation or to set it aside, but it must not be forgotten that this is a case of fraud as well as of mistake, and a court of equity considers the conduct of the parties in adjudging things done by them void for fraud. Fraud vitiates everything. The authorities cited by the learned counsel of the appellant are inapplicable to such a case.

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Where can the plaintiff have a remedy for such wrongs, if not in the courts? The power of a court of chancery is plenary in such a case. We think the judgment is correct and just, and that no sound legal principle is violated by it.

By the Court.— The judgment of the superior court is affirmed.

THE STATE VS. COMPTON.

September 9 — September 23, 1890.

CRIMINAL LAW AND PRACTICE. *(1-4) Change of venue for prejudice of judge: Jurisdiction. (5) Sending threatening letter.*

1. An order for a change of of venue, which recites the filing of an affidavit of prejudice, is not invalid merely because the clerk failed to indorse upon such affidavit the fact of filing.
2. Mere delay in making an order for a change of venue — in this case for about two months after the making of an affidavit of prejudice — does not invalidate the order.
3. The mere fact that the clerk, upon a change of venue being ordered, failed to transmit with the other papers a copy of his minutes, does not prevent the change being effectual.
4. Failure to require the accused to enter into a recognizance, as provided in sec. 4682, R. S., for his appearance in the court to which the venue is changed, does not prevent that court from acquiring jurisdiction of the action; nor does any irregularity in bringing the accused into that court deprive it of such jurisdiction.
5. Sending to ladies engaged in business a letter as follows: "If you do not leave this city inside 10 days you will be tarred and feathered, now we 'mean' it, from the lovers of decent 'Citizens.' You are counted a nusants by all,"— is an offense under sec. 4380, R. S., as amended by ch. 243, Laws of 1887.

EXCEPTIONS from the Circuit Court for *Juneau* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It appears from the record that the defendant was arrested February 26, 1889, upon a complaint made to and

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filed with a justice of the peace and a warrant issued thereon, and upon examination before the justice he was held for trial in the circuit court for Wood county; and thereupon he gave the requisite bail for his appearance at the next term of that court. That on or about May 27, 1889, the district attorney for Wood county filed an information against the defendant in the circuit court for that county, wherein it was charged in effect that said defendant did unlawfully, wrongfully, maliciously, and feloniously write, make, indite, and address to, and cause to be sent to and received by, Ella and Mary Corcoran, sisters, unmarried, then and there being, residing, and doing business in the city of Grand Rapids in said county, whose surname was then and there, in said county and city, spelled either Cochran or Corcoran, and who were then and there generally well known by said name spelled either way, a written communication in the words and figures following, to wit:

"Grand Rapids, Feby. 15, '89.

"To both of the Miss Cochrans:

"If you do not leave this city inside 10 days you will be tarred and feathered, now we 'mean' it from the lovers of decent 'Citizens.' You are counted a nusants, by all."

— for the purpose, and with the wrongful, unlawful, malicious, and felonious intent, then and there and by that means, to compel the said Ella and Mary to remove and depart from said city against their wishes and against the will of each, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin. That May 28, 1889, the defendant was duly arraigned in open court, and pleaded not guilty to the charge alleged in such information. That upon the case being called, May 29, 1889, the defendant made an affidavit of prejudice of the judge, and thereupon asked for a change of the place of trial of said action. That afterwards, and on July 27, 1889, the court thereon ordered the removal of

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said cause to Juneau county. That said order recited the making and filing of said affidavit of prejudice, and the same was filed therein on that day. That all of the original papers on file, with the certificate of the clerk of the circuit court for Wood county, made under his hand and the seal of said court, July 30, 1889, were filed in the office of the clerk of the court of Juneau county, August 10, 1889. That a certified copy of the clerk's minutes was afterwards transmitted and filed in the clerk's office for Juneau county, October 10, 1889, and just previous to the trial of said cause. That the defendant having been duly called on the first day of said term of court, and having failed to appear, a warrant was thereupon issued by said court to the sheriff of said Juneau county, who thereupon and by virtue thereof arrested said defendant, and brought him in custody before said court, October 10, 1889. That upon said cause being called for trial in the circuit court for said Juneau county on said last-mentioned day, the defendant by his counsel moved the court to remand the cause back to Wood county, for the reason that it appeared from the record in said cause that the case was not properly in said circuit court of Juneau county, and that said last-named court had no jurisdiction, which said motion was then and there denied, to which ruling the defendant then and there duly excepted. That said cause was thereupon tried in the circuit court for Juneau county, October 11, 1889, and, upon such trial, the jury returned their verdict in open court, wherein they found the defendant guilty of the charge set forth in said information, which verdict was then and there entered in said court. That thereupon the said defendant then and there, upon the minutes and proceedings of said trial, gave notice of a motion to set aside said verdict and for a new trial, for, among other reasons, that the court had no jurisdiction of the action, of the defendant, or the subject matter of the action. That October 14, 1889, the said court, hav-

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ing heard counsel for and against said motion, and having duly considered the same, thereupon denied said motion, to which ruling the defendant then and there excepted. That thereupon the defendant, by his counsel, then and there, before judgment and sentence, moved the court in arrest of judgment, for the reason that the communication set out in the action, for the writing of which the defendant was found guilty, does not constitute an offense under the statute. That the court, having entertained said motion, and duly considered the same, then and there denied said motion, to which ruling and decision the defendant then and there duly excepted. All of which said exceptions, having been reduced to writing in a summary mode, and presented to the court before the end of said term, and found to be conformable to the truth of the case, were allowed and signed by the judge of said court, October 14, 1889.

The *Attorney General* and *L. K. Luse*, Assistant Attorney General, for the plaintiff, argued, among other things, that the information charges an offense under sec. 4380, R. S., as amended by ch. 243, Laws of 1887. The statute of Michigan is very like our own. 2 How. Stat. sec. 9093; *People v. Braman*, 30 Mich. 460; *People v. Jones*, 62 id. 304. That of New York is somewhat similar. R. S. of N. Y. 1882, Penal Code, sec. 559; *People v. Griffin*, 2 Barb. 427. The malice required by the statute is not a feeling of ill-will towards the person threatened, but the wilful doing of an act with illegal intent. *Comm. v. Goodwin*, 122 Mass. 19; *Comm. v. Buckley*, 148 id. 27. See, also, note to sec. 4380, S. & B. Ann. Stats.; *State v. Stewart*, 90 Mo. 507; *State v. Patterson*, 68 Me. 473; *People v. Thompson*, 97 N. Y. 313; *People v. Wightman*, 104 id. 598; *Comm. v. Moulton*, 108 Mass. 307; *Comm. v. Goodwin*, 122 id. 19; 2 Whart. Crim. Law (9th ed.), sec. 1664; 2 Bish. Crim. Proc. (3d. ed.), secs. 1024 *et seq.*

H. W. Remington, for the defendant.

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Cassoday, J. This cause comes to this court upon exceptions allowed and signed by the trial judge, under sec. 4720, R. S. The learned counsel for the defendant contends that the circuit court for Juneau county never obtained jurisdiction of the action by reason of irregularities in the proceedings in changing the venue. It is said that there is no mark or date of filing upon the affidavit of prejudice. But the order changing the venue recites that it was filed; and if it was placed in the custody of the clerk, then it was, in law, duly filed, whether such filing was evidenced by the clerk's writing the fact of such filing upon it or not. Certainly the mere delay of the circuit court for Wood county to make the order changing the venue in accordance with the application of the defendant, as stated, did not deprive that court of jurisdiction to make the order, nor render the order less effectual when made. We must regard the order, therefore, as regularly made and entered July 27, 1889.

The statute authorized the defendant to apply for such change of venue, "in the manner provided by law for a change of venue in civil actions" (sec. 4680, R. S.); and he did so (sec. 2625, S. & B. Ann. Stats.). It thereupon became the duty of the court "to award such change," and it did. Sec. 4680, R. S. All the original papers appear to have been regularly transmitted to the clerk of the circuit court for Juneau county, July 30, 1889, and duly filed in that court, August 10, 1889. The mere fact that the clerk neglected to transmit, with the other papers, the minutes of the clerk as to the defendant's being arraigned and pleading not guilty, and the application for and the awarding of the change of venue, did not prevent such change being effectual. The defendant's affidavit of prejudice, and the order of the circuit court for Wood county changing the venue therein to the circuit court for Juneau county, vested the latter court with complete jurisdiction of the action. This being so, the court properly refused to remand the

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case back to the county of Wood for want of such jurisdiction.

The statute provides, in effect, that when the court has ordered a change of venue, it shall require the accused to enter into a recognizance conditioned for his appearance in the court to which the venue is changed, and to abide the order of such court; and, in default, he shall be imprisoned, etc. Sec. 4682, R. S. Counsel contend that, because this was not done, the circuit court for Juneau county did not get rightful jurisdiction of the person of the defendant. But the trial judge has certified no objection nor exception to the manner in which the defendant's personal appearance was obtained in that court. That question, therefore, is not before us for consideration. Had the defendant voluntarily appeared in the trial court to answer the information, no one would have questioned the jurisdiction of that court to have tried him. That court, therefore, as we have seen, had complete jurisdiction of the action; and there is much force in the argument of the attorney general to the effect that the court, having jurisdiction of the action, could make it effectual by coercing the personal presence of the defendant. But, assuming that the defendant was irregularly brought into the trial court, yet that did not deprive that court of jurisdiction to proceed with the trial, nor furnish any reason for arresting the judgment. Besides, as indicated, the question as to whether there was such irregularity is not before us for review.

The statute also provides that when a change of venue is ordered the court shall recognize the witnesses, etc. Sec. 4683, R. S. But no one would claim that a failure to do so would deprive the court to which the venue is changed of jurisdiction to try the offender. Such order respecting the witnesses, and such order respecting the recognizance and appearance of the offender, are only required when the venue has in fact been changed, and not as conditions pre-

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cedent to, nor as essential to, the change itself. In other words, such orders are not required to give jurisdiction of the action to the court to which such venue is changed, but to aid and render effectual such jurisdiction after such change is made.

It is, moreover, contended that the information fails to charge the defendant with the commission of any offense under sec. 4380, R. S., as amended by ch. 243, Laws of 1887. This statute is to the effect that any person who shall, by any written or printed communication, maliciously threaten to do any injury to the person, business, or trade of another, with intent to compel the person so threatened to do any act against his will, or omit to do any lawful act, shall be punished, etc. It is contended, in effect, that the defendant, in sending the communication found in the foregoing statement and upon which this prosecution is based, did not threaten to do either of the acts therein mentioned himself, but merely informed the two ladies named what somebody else intended to do if they did not leave the city within the time therein named. In the learned note to the section by Sanborn & Berryman, cases are cited holding in effect that "the crime may be committed by one who sends a letter conveying a threat of some other person to do the forbidden acts, provided he sends the letter for the unlawful purpose mentioned." *People v. Thompson*, 97 N. Y. 313. "The malice required by the statute is not a feeling of ill will towards the person threatened, but the wilful doing of the act with the illegal intent." *Comm. v. Goodwin*, 122 Mass. 35. Under these authorities, it would seem the information charges an offense, even if the communication were capable of the construction contended for by counsel. But we think the communication is fairly capable of being construed to the effect that the sender or senders would execute the threat unless the ladies left the city within the time named. It, in effect, therein declared that the ladies

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named were counted a nuisance by all the citizens of the city. It purported to be sent by the lovers of decent citizens. It informed the ladies named that, unless they left the city within the time mentioned, they would be "tarred and feathered," and added, "*Now we mean it.*" There can be no question but what the information charged an offense under the statute in question.

By the Court.— The exceptions certified are all overruled, and the cause is remanded for further proceedings according to law.

THE STATE vs. S. A. L.

September 9 — September 23, 1890.

Criminal pleading: Place of offense.

Where a county is named in the caption of an information by an officer describing himself as the district attorney of that county, an allegation that the offense was "then and there" committed sufficiently shows that it was committed in said county.

REPORTED from the Municipal Court of *Dane* County.

The facts are stated in the opinion.

The *Attorney General* and *L. K. Luse*, Assistant Attorney General, for the plaintiff, cited secs. 4658, 4659, 4669, R. S.; 1 Bish. Crim. Proc. sec. 379; *State v. Bell*, 3 Ired. 506; *State v. May*, 4 Dev. 328; *State v. Tolever*, 5 Ired. 452; *Strickland v. State*, 7 Tex. App. 34; *State v. Reid*, 20 Iowa, 413; *State v. Slocum*, 8 Blackf. 315; *People v. Breese*, 7 Cow. 429; *State v. Harnden*, 1 Brev. (S. C.), 37; *Sanderlin v. State*, 2 Humph. 319; *Stephen v. Comm.* 2 Leigh, 759; *State v. Bell*, 26 Minn. 388; *Comm. v. Butterick*, 100 Mass. 12; *Fisk v. State*, 9 Neb. 62; *Anderson v. State*, 104 Ind. 467; *Thomas v. State*, 71 Ga. 44; *State v. Lillard*, 59 Iowa, 479; *Long v. State*, 56 Ind. 133, 182.

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James H. Feeney and *F. W. Hall*, for the defendant, cited *State v. Gaffrey*, 3 Pin. 370; *State v. Delue*, 2 id. 204; *State v. Cotton*, 24 N. H. 146; *State v. Shull*, 3 Head (Tenn.), 42; Moore, Crim. Law, sec. 166; *Kennedy v. Comm.* 3 Bibb (Ky.), 490; 1 Bish. Crim. Proc. secs. 379, 380.

Cole, C. J. This case is reported to this court by the municipal court of Dane county for the decision of the following question, to wit: Should the motion in arrest of judgment be granted for the reason that the information does not state sufficiently the place where the offense was committed? The defendant was convicted of the crime of adultery, upon an information in substance as follows (omitting the title): "State of Wisconsin, Municipal Court, Dane County. I, John L. Erdall, district attorney for Dane county, hereby inform the court that *S. A. L.*, on the 2d day of January, A. D. 1890, being then and there the lawful wife of W. T. L., did unlawfully and feloniously commit the crime of adultery with one M. C., and did unlawfully and feloniously permit said M. C. to have, and the said M. C. did *then and there* have, carnal knowledge of her body, against the peace and dignity of the state of Wisconsin." The objection is that the information does not show that the offense was committed in Dane county, within the jurisdiction of the municipal court.

It must be admitted that the information is informal because it does not state with more particularity the county where the offense was committed, and respectable authorities may be found which would hold it bad for that reason. But the tendency of modern decisions is to relax the strict rules which formerly prevailed, even in criminal proceedings, and the legislature has expressly sanctioned that tendency in our criminal code. Many defects or formal imperfections in the information which do not tend to the prejudice of the accused are to be disregarded. The

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nature of the offense of which the defendant is accused should be stated with reasonable certainty, so that he will not be misled as to the offense of which he is charged. Now, in this case, it is said there is a failure to state, in the body of the information charging the offense, *where* or the county in which it was committed. To this objection it is answered by the learned assistant attorney general that the information contains words of reference which necessarily locate the offense as clearly as though the county in which it was committed had been repeated or given. The county is named both in the caption and body of the information. The words "then and there" are used twice in the information. These are certainly words of reference, and the question is, to what do they refer? The first time they are used they doubtless refer to the *status* or social condition of *S. A. L.*, as being the lawful wife of W. T. L. But in the second place, where the words are used that "M. C. did then and there have carnal knowledge of her body," they must necessarily refer to Dane county, which is previously mentioned or described. This is the plain, natural meaning and sense of the language used. "The words then and there, as used in an indictment, are words of reference, and when time and place have once been named with certainty it is sufficient to refer to them afterwards by these words; and they have the same effect as if the time and place were actually repeated. Whart. Crim. Law, 74. These words also refer to the time and place last specified, unless there be some phrase connected therewith which show that a different reference was intended." *State v. Cotton*, 24 N. H. 143; *State v. Bell*, 3 Ired. 506; *State v. Tolever*, 5 Ired. 452; *Strickland v. State*, 7 Tex. App. 34; *State v. Reid*, 20 Iowa, 413; *State v. Slocum*, 8 Blackf. 315,—lay down the same rule that where the venue is laid in the margin or in the body of the information, and it is alleged that the defendant did then and there commit the offense, that these

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words fairly and reasonably refer to the county named in the preceding part of the information, and show with sufficient certainty where the offense was committed. We know of no decisions in this court in conflict with this rule. The decisions in Pinney, to which we were referred on the argument, are not, in principle, opposed to it, and we are therefore disposed to hold that the information in this case does sufficiently show the place where the offense was committed.

By the Court.— The question submitted by the municipal court we answer in the negative, and the cause is remanded to that court with this our decision, for further proceedings according to law.

McQUAID, Respondent, vs. Ross and another, Appellants.

September 6 — October 14, 1890.

Sale of chattels: Warranty: Parol evidence.

Upon the sale of a bull the vendor gave to the vendee a writing which, after setting forth the pedigree of the bull, stated: "I have this day sold the above-named bull . . . to [the vendee]. I hereby certify the above pedigree to be true." *Held*, that as this writing evidenced the sale and contained an express warranty not implied by law, parol evidence was inadmissible to show a further express warranty against sterility.

APPEAL from the Circuit Court for *La Fayette* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action was brought to recover damages on a contract for the sale by the defendants to the plaintiff of a thoroughbred Durham bull. The plaintiff in his complaint, in the first count thereof, seeks to recover damages on an implied warranty that the bull was not sterile and incom-

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petent from latent defects to beget calves or generate his kind, and upon allegations that said bull was so sterile and incompetent, and so entirely worthless for the purposes for which he was bought by the plaintiff, by reason whereof the plaintiff had been greatly damaged. In the second count of the plaintiff's complaint, he alleges that in consideration that the plaintiff would purchase said bull and pay the defendants therefor the sum of $125, the said "defendants warranted said bull to be of a superior pedigree, and to be in good condition, and fit and suitable for the purposes for which he was purchased by the plaintiff," and that, relying on such warranty, he purchased said bull and paid the defendants therefor the sum of $125, and that, after having fairly and sufficiently tested said bull, it was ascertained that he was sterile and entirely incompetent to beget calves, and worthless for the purpose for which he was purchased, and upon ascertaining that fact the plaintiff returned the said bull to the defendants, and demanded repayment of the sum paid to them for him, and reasonable damages, which the defendants refused to pay.

On the trial in the circuit court the learned circuit judge decided that the plaintiff could not recover upon the first cause of action, viz., upon an implied warranty that the bull was in all respects fit, suitable, and competent to perform the service for which he was purchased. And as to the second count, or cause of action, which charged that the defendants expressly warranted the bull fit and suitable for the purposes for which he was purchased by the plaintiff, the learned circuit judge submitted the case to the jury upon the evidence, and the jury found in favor of the plaintiff, and assessed his damages at $192.35, being the purchase price and interest thereon.

On the trial the plaintiff introduced, as evidence of the sale to him of the bull and his purchase thereof, a writing signed by the defendants. This writing first stated at length

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the pedigree of the said bull, and then closes as follows: "I have this day sold the above-named bull, 'Star of Fairview,' to *P. F. McQuaid*, of Darlington, Wis. I hereby certify the above pedigree to be true. Dated June 30, 1888. [Signed] J. J. Ross & SONS." After the introduction of this contract of sale, the defendants objected to the introduction of any evidence on the part of the plaintiff as to what took place at the time of the sale, or before the sale, for the purpose of showing an express warranty of the bull, for the reason that "the written contract conclusively proves the final contract between the parties concerning the qualities of the animal, and that parol evidence is inadmissible to change, modify, or add to the same." This objection was overruled by the court, and the defendants duly excepted, and thereafter the court permitted the plaintiff to show by parol evidence all the conversations had between the parties while negotiating for the purchase and sale of said bull; and this evidence was allowed to be introduced by the plaintiff for the purpose of showing that the defendants, at and before the sale, warranted that said bull was fit, competent, and in every way suitable for the purposes for which he was purchased by the plaintiff.

The defendants appealed from the judgment in favor of the plaintiff.

For the appellants there was a brief by *Orton & Osborn* and *J. M. Smith*, and oral argument by *P. A. Orton*. To the point that where a sale is evidenced by a writing containing an express warranty not implied by law, other express warranties cannot be shown by parol, they cited, besides cases referred to in the opinion, 2 Benj. Sales, sec. 942, note 13; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Whitmore v. South Boston Iron Co.* 2 Allen, 58; *Dutton v. Gerrish*, 9 Cush. 89; *Boardman v. Spooner*, 13 Allen, 361; *Frost v. Blanchard*, 97 Mass. 155; *Chandler v. Thompson*, 30 Fed. Rep. 46; *Ottawa B. & F. G. Co. v. Gunther*, 31 id. 210, and

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cases cited; *Nichols v. Wyman*, 71 Iowa, 160; *Mast v. Pearce*, 58 id. 579; *Shepherd v. Gilroy*, 46 id. 193; *Boothby v. Scales*, 27 Wis. 632; *Collette v. Weed*, 68 id. 428.

For the respondent the cause was submitted on the brief of *Rose & Hooper*, attorneys, and *D. S. Rose*, of counsel. They contended, *inter alia*, that the so-called bill of sale is not a bill of sale and was not considered such by the parties. It is simply a certificate of the bull's pedigree. It was not intended or considered by the parties as a warranty. It is a warranty neither of title nor soundness, and should not be held to preclude parol evidence of an express warranty of either of those elements which are alone susceptible of warranty. If held to be a warranty of pedigree, then it carries with it, by necessary implication, a warranty that the bull would breed.

TAYLOR, J. The learned circuit judge having ruled that the plaintiff could not recover upon the theory that there was an implied warranty by the defendants that the bull was fit and competent to accomplish the purpcse for which he was purchased, the only other material questions arising on the record are: (1) Did the court err in permitting parol evidence to be given to prove an express warranty not contained in the written bill of sale? And (2) if such evidence was admissible, does the evidence sustain the verdict of the jury upon that question? As we have come to the conclusion that the court erred in admitting any parol evidence for the purpose of proving an express warranty in this case, the second question becomes immaterial.

This court, as well as nearly all other courts, has held that upon a sale of personal property which is evidenced by a written contract of sale, if such written contract contains any express warranty in regard to the thing sold other than such warranty as the law implies, no other express warranty can be proved by parol. The ground of

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these decisions is that such parol evidence extends, contradicts, or modifies the written agreement, and is therefore inadmissible. The parties to the sale having put the evidence of sale in writing, and such writing having expressly warranted the thing sold in certain respects, the law presumes that no other express warranties were intended, and the courts will not receive parol evidence of other express warranty, because such evidence tends to change, enlarge, or modify the written contract between the parties.

In the case of *Merriam v. Field*, 24 Wis. 640, 642, the late learned Justice PAINE says: "The plaintiff relied on a class of cases holding that although the bill of sale or other conveyance had been executed in writing, still when such paper did not profess or attempt to express the entire agreement between the parties, but was merely executed in part performance of it, the whole agreement might be shown, although part of it rested in parol. But the difficulty in applying this rule here is that the written bill of sale does contain express warranties in respect to one or two particulars, and, when that is the case, it can no longer be said that the writing does not attempt to express the contract between the parties so far as express warranties are concerned. The presumption then is that it expresses the whole contract as to such warranties, and to allow others to be shown by proving verbal statements at the time of the sale would be in violation of the old and salutary rule against varying and adding to written contracts by parol evidence."

The rule of this decision has been frequently followed in this court, especially in *Cooper v. Cleghorn*, 50 Wis. 113, 123; *Schultz v. Coon*, 51 Wis. 416; *Wiener v. Whipple*, 53 Wis. 298, 303. The rule of this court is fully sustained by the decisions of many other courts, as will be seen by referring to the authorities in the brief of the learned counsel for the appellants. This rule is modified by this court, as well as

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by many other courts, in case of warranties contained in deeds conveying real estate. See *Green v. Batson*, 71 Wis. 54, and the cases cited in the opinion in that case. The reasons for the distinction are fully stated by Justice ORTON in the case cited.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

TREAT and another, Appellants, vs. HILES, Respondent.
TREAT and another, Respondents, vs. HILES, Appellant.

September 23 — October 14, 1890.

Offsetting judgments: Stay of execution.

A stay of execution upon a judgment is a protection against the collection of any part of it by legal process, and hence another judgment cannot be offset against it during such stay.

APPEALS from the Circuit Court for *Milwaukee* County.

The facts are stated in the opinion.

The motion was submitted for the plaintiffs on the brief of *N. S. Murphey*, and for the defendant on that of *John W. Cary*, attorney, and *Rose & Bell*, of counsel.

Counsel for the plaintiffs cited *Taylor v. Williams*, 14 Wis. 155; *Yorton v. M., L. S. & W. R. Co.* 62 id. 372; *Bosworth v. Tallman*, 66 id. 533.

LYON, J. Motion by plaintiffs to offset judgments.

The case was in this court on three appeals from orders made therein by the circuit court. 75 Wis. 265. One of these appeals was by plaintiffs, the others by defendant. The plaintiffs' appeal was dismissed, with costs taxed at $45.25. One of the defendant's appeals was also dismissed, with costs taxed at $46.85. On the remaining appeal of

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defendant, the order appealed from was reversed, with costs taxed at $200.

The cause in which these appeals was taken was afterwards tried in the circuit court, and the plaintiff recovered judgment for $20,000 and costs.

The plaintiffs now move this court to offset the judgments against them for costs, amounting to $245.25, and to apply the same in payment of the judgment for costs in their favor for $46.85 in this court, and the balance thereof, being $198.40, on the judgment recovered by them in the circuit court. The defendant consents that the judgment for $45.25 against the plaintiffs may be applied in part payment of the judgment against him for $46.85, and that the balance of the latter judgment, being $1.60, may be applied on the $200 judgment against the plaintiffs. But he objects to an offset of the residue of the $200 judgment, and its application upon the judgment against him in the circuit court, for the reason that on August 11, 1890, the circuit court granted a stay of execution upon that judgment for sixty days, to enable him to perfect an appeal therefrom, which stay was in full force when this motion was made.

We think this a conclusive answer to this motion, so far as the motion is contested. The order staying execution is a protection to the defendant against the collection of any part of the judgment by legal process. Were this motion granted, the effect of it would be to enforce collection of a portion thereof by such process. We cannot thus disregard the order of the circuit court in that behalf.

By the Court.— The motion, in so far as it affects the judgments in this court, is granted; but in so far as it affects the judgment in the circuit court, it must be denied. No costs are allowed to either party on the motion.

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BIRON, Respondent, vs. EDWARDS, Appellant.
BIRON, Respondent, vs. SCOTT, Trustee, Appellant.
BIRON, Respondent, vs. EDWARDS, Appellant.
BIRON, Respondent, vs. SCOTT, Trustee, Appellant.

September 23 — October 14, 1890.

Consolidation of actions: Parties: Equity.

1. Two of three heirs having each brought actions to charge the representative of the administrator of the estate of their ancestor, and one who had been the business partner of said administrator, separately, with the profits arising from their dealings with the lands of said ancestor, and it appearing that each cause of action arose out of the same transactions and that the rights of all parties could be fully protected in a single action, the court properly ordered that all four actions be consolidated and, on motion of the third heir, that he be made a party to the consolidated action.
2. The power of a court of equity to consolidate actions does not depend upon any statute for its existence.

APPEALS from the Circuit Court for *Monroe* County.

These two appeals are from an order of the circuit court of Monroe county consolidating the four above-entitled actions into a single action, and directing the procedure in such consolidated action.

In 1888 the plaintiff *George S. Biron* brought two actions, one in the circuit court of Wood county against *John Edwards*, and the other in the circuit court of Lincoln county against *Walter A. Scott*, as trustee of the estate of Thomas B. Scott, deceased. The alleged causes of action in both arise out of the same transactions. These transactions as alleged in the complaint are, in substance, that one Francis Biron, a resident of Wood county, died intestate in 1877, leaving as his only heirs at law Francis Biron, Jr., *Mary Laura Biron*, and the plaintiff *George S. Biron;* that Thomas B. Scott was duly appointed administrator of his estate, and as such in 1881 procured from the proper court

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a license to sell, and did sell, a large quantity of timbered lands belonging to such estate, of great value; that the defendant *Edwards*, who was a partner of such administrator, was the nominal purchaser at such sale, and the administrator conveyed the lands to him, but that the real purchaser was the firm of Scott & Edwards, each partner paying one half of the consideration, and that *Edwards*, without further consideration, soon thereafter conveyed to such administrator an undivided one-half of the lands; that Thomas R. Scott died in 1886, testate, in Lincoln county, leaving all his real estate in Wisconsin and other property to the defendant *Walter A. Scott*, in trust for certain purposes specified in his will, and such estate has been turned over to such trustee, who has the custody and control of all the property belonging thereto; that, in 1887, *Walter A. Scott*, as such trustee, and *Edwards* sold the same lands, and received therefor a sum largely in excess of their cost. The complaint contains numerous other averments of fact not necessary to be here stated. The relief demanded in each action is that the defendant therein be adjudged to hold the money received for such lands, or an equitable proportion thereof, in trust for the benefit of the heirs of Francis Biron, deceased, and that one third thereof be paid over to the plaintiff. An accounting and general relief are also demanded.

Each defendant demurred to the complaint against him on the grounds of want of jurisdiction and the non-joinder of the other defendant as a defendant in the action. The place of trial of both actions was thereupon changed to Monroe county, and that court afterwards overruled such demurrers. Each defendant then answered in the action against him, alleging facts claimed to be a defense thereto. The answers of both defendants are substantially alike. The specific contents thereof are immaterial on these appeals.

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In October, 1889, *Mary Laura Biron*, another of the heirs of Francis Biron, deceased, also commenced two corresponding actions, one in Wood county against *Edwards*, and the other in Lincoln county against *Walter A. Scott*, as trustee as aforesaid, to recover her share of the funds claimed to be held by the defendants respectively, on account of such sales, for the use and benefit of such heirs. The allegations of the complaints in these actions are substantially like those in the complaints in the corresponding actions brought by *George S. Biron* against the same defendants. Each defendant demurred to the complaint against him for defect of parties plaintiff and defendant, naming the two other Biron heirs as necessary plaintiffs, and the defendant in the other action as a necessary defendant. This demurrer has not been decided. The place of trial of these actions was afterwards also changed to Monroe county; but before such change the circuit court of the latter county, on motion of all the heirs of Francis Biron, deceased, made an order, dated February 12, 1890, making all of such heirs parties to each of the actions of *George S. Biron*, with leave to bring in other defendants should the plaintiff be so advised. On April 7, 1890, that court made the order consolidating the four actions from which these appeals were taken. The material portion of such order is as follows:

"Ordered that the several causes above entitled be and they hereby are consolidated into one action in this court; that Francis Biron be and he hereby is made a plaintiff in said action; that such action proceed in the name of *George Severe Biron*, *Mary Laura Biron*, and Francis Biron, plaintiffs, against *John Edwards* and *Walter A. Scott*, as trustee of the estate of Thomas B. Scott, deceased, defendants, with such other parties defendant as plaintiffs may determine to bring in, pursuant to the order of this court heretofore made; that the plaintiffs make their complaint in such consolidated action within forty days after the date of this

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order, or, in case appeal is taken therefrom and same is affirmed, then within twenty days after the return of the record to this court; that the defendants have twenty days after service of such complaint in which to answer the same, but that they have leave to stand in such consolidated action upon their answer or answers in either or both of the above-entitled actions wherein said *G. S. Biron* is plaintiff, or upon the demurrer or demurrers in either or both the actions wherein *Mary Laura Biron* is plaintiff, provided they, within said twenty days, give notice to plaintiffs' attorney whether they elect to stand upon said answer or answers, or on said demurrer or demurrers."

The order also requires the plaintiffs to pay the costs in the actions of *Mary Laura Biron* to the date of the motion for consolidation, and leaves the costs in the actions of *George S. Biron* to abide the event of the litigation, subject to the discretion of the court. The defendants *Edwards* and *Scott* appeal separately from the order of April 7, 1890.

For the appellants there was a brief by *Gardner & Gaynor*, attorneys, and *Pinney & Sanborn*, of counsel, and the cause was argued orally by *Geo. R. Gardner* and *S. U. Pinney*. They contended, *inter alia*, that the issues in the several actions to be consolidated must be identical. The parties to such actions, plaintiff and defendant, must be the same. Each action must be perfect in itself; that is to say, an action having all the parties joined therein necessary to enable the court to render a final judgment or decree. None of these essential conditions existed when the order of consolidation was made in this case. 1 Tidd, Pr. 531; *Westbrook v. Australian R. M. S. Nav. Co.* 14 C. B. 113; 2 R. S. of N. Y. 305, sec. 37 (383, sec. 36); 1 Bur. Pr. 411; N. Y. Code, sec. 817; 2 Wait, Pr. 555–6; 2 Till. & S. Pr. 277; *Wilkinson v. Johnson*, 4 Hill, 46; R. S. sec. 2792; *Winninghoff v. Wittig*, 64 Wis. 180, 182–3; *McCartney v. Hubbell*, 52 id. 361. Subject to the above conditions, which go to the

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power of the court to consolidate actions, the granting of the order is a matter of discretion, but (1) it will not be granted where it will cause embarrassment or delay. (2) Where a defense is to be made, the affidavits must show that the same question or questions are to be litigated in both or all of the actions, and enough of the nature of the action *and of the defense* should be stated to make this appear to the court. *Wilkinson v. Johnson*, 4 Hill, 46; *Dunning v. Bank*, 19 Wend. 23; *Dunn v. Mason*, 7 Hill, 154. (3) A consolidation of these four actions, all other necessary conditions existing, could not be had until final joinder of issue of fact in all. *Briggs v. Gaunt*, 2 Abb. Pr. 77; *Le Roy v. Bedell*, 1 Code (N. S.), 201.

Both *Edwards* and *Scott* and all the heirs were necessary parties to any action seeking the relief here prayed for. *Eldredge v. Putnam*, 46 Wis. 205; Freeman, Cotenancy, sec. 369; *Young v. Bilderback*, 3 N. J. Eq. 206; *Harding v. Handy*, 11 Wheat. 103. Under sec. 3192, R. S., any one of the heirs might have brought the action, making the others parties, but no *joint* action could be brought by any number less than all. In this case, two of the heirs had brought their separate actions, but the third had no action to be consolidated with the others, to answer the necessities of sec. 3192. The order, then, consolidates four actions which could not have been joined in an original suit, with a provision for bringing in the third party not then represented before the court in any proper or legitimate way. There is no authority for such practice. All the actions should have been dismissed except one, and the proper parties should have been brought into that by amendment. *Jamison v. B. & W. R. Co.* 78 Iowa, 562; *Wing v. Huntington*, Seld. Notes (2d ed.), 210.

The statute in respect to consolidation is not applicable to equitable actions. Voorhees' Code, 336*f*; *Bech v. Ruggles*, 6 Abb. N. C. 69; *Lockwood v. Fox*, 8 Daly, 127; *Kipp*

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v. Delamater, 58 How. Pr. 183; *Warden v. Isherwood*, 2 Sim. 476; *Forman v. Blake*, 7 Price, 654; *Foreman v. Southwood*, 8 id. 572. The practice in equity, where two suits relate to the same subject, is to stay proceedings in one of them. 1 Daniels, Ch. Pr. 797–800; *Pott v. Gallini*, 1 Sim. & S. 206, 210; *Budgen v. Sage*, 3 Mylne & C. 684, 687.

For the respondents there was a brief by *Geo. L. Williams*, attorney, and *Moses Hooper*, of counsel, and oral argument by *Mr. Williams*. They argued, among other things, that the order simply adopted the position previously taken by defendants. Each defendant claimed in each action that the other should be united with him, and that all the heirs should be plaintiffs. It now seems that they object to having their own way. *Allegans contraria non est audiendus.* The only statutory limitation upon consolidation in this state is that the actions be in the same court and for causes which might have been joined. Sec. 2792, R. S., by departing from the language of the New York Code shows an intention to change the rule making other incidents necessary to consolidation. Final issue need not have been joined in all the actions. *Soloman v. Belden*, 12 Abb. N. C. 58; *Deering v. Winona H. Works*, 24 Fed. Rep. 90; *Brewster v. Stewart*, 3 Wend. 441–2. The issues need not be identical. *Smith v. Smith*, 80 Cal. 323–4; *Den v. Kimble*, 9 N. J. Law, 335, 337; *Syers v. Pickersgill*, 27 L. J. Exch. 5; *Beardsall v. Cheetham*, 27 L. J. Q. B. 367. The parties need not be the same. *Burnham v. Dalling*, 16 N. J. Eq. 310–312; *Den v. Kimble*, 9 N. J. Law, 335, 337; *Conover v. Conover*, 1 N. J. Eq. 403, 412; *Wilson v. Riddle*, 48 Ga. 609; *Beach v. Woodyard*, 5 W. Va. 231; *M'Rae v. Boast*, 3 Rand. (Va.), 481; *Morley v. M. R. Co.* 3 F. & F. 961; *State ex rel. Kemp v. H. & St. J. R. Co.* 89 Mo. 571. The statute authorizes consolidation of equitable actions; but consolidation has often been had in equity when there was no statutory authority therefor. *Wyatt v.*

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Thompson, 10 W. Va. 645, 650; *Burnham v. Dalling*, 16 N. J. Eq. 310, 312; *Conover v. Conover*, 1 id. 403, 412; *Taylor's Heirs v. Watkins*, 7 J. J. Marsh. (Ky.), 363, 365; *Young v. Gray*, 65 Tex. 99; *Campbell's Case*, 2 Bland (Md.), 209; *Deering v. Winona H. Works*, 24 Fed. Rep. 90; *Keighley v. Brown*, 16 Ves. 344; *Newberry v. Alexander*, 44 Ohio St. 346; *Lofland v. Coward*, 12 Heisk. (Tenn.), 546. Such seems to have been the later equity practice in England before the modern judicature acts, where suits were consolidated, and even moved from one court to another for the purpose of consolidation. *Zambaco v. Cassavetti*, L. R. 11 Eq. Cas. 439, 442–4; *Rhodes v. Barrett*, 12 id. 479, 481; *Lyall v. Weldhen*, L. R. 9 Ch. App. Cas. 287–9; *Sayers v. Corrie*, id. 52; *Orrell v. Busch*, 5 id. 467; 1 Daniels, Ch. Pr. (Cooper's ed. 1879), 339, note 3. The order to bring in new plaintiff on his own motion was proper, without regard to consolidation. R. S. sec. 2610. It was also proper as part of consolidation order. *Brown v. District of Columbia*, 17 Ct. Claims, 303. The difference between consolidation and staying proceedings in all the suits but one, is only in name. 1 Burrill, Pr. 411, 412.

Lyon, J. It may be observed at the outset that in any action to charge the defendants *Edwards* and *Scott* with the profits realized out of the lands belonging to the estate of Francis Biron, deceased, which were conveyed by the administrator of that estate to *Edwards*, all the heirs of Francis Biron, and the defendants *Edwards* and *Scott*, are necessary parties thereto. Without the presence of all of them as parties, the court cannot make a full and final determination of the controversy. This is conceded by the learned counsel for the appellants.

The order from which these appeals were taken brings in Francis Biron, Jr., one of such heirs who had not theretofore brought any action, as a party to the consolidated action,

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at his own request. If the four actions were properly consolidated into one action, it is manifest that this was correct practice. In this particular the order has no necessary connection with the order of consolidation. The case stands just as it would have stood had an order been made consolidating the four actions, and afterwards another order bringing in Francis Biron, Jr., as a party plaintiff in the consolidated action, or had he been thus brought into each action before the consolidation. Hence, the controlling question on these appeals is, Were the four actions properly consolidated?

In each of the four actions the complaint states a cause of action in equity in favor of the plaintiff and against the defendant therein. The transactions out of which each such cause of action arose are common to all the actions. The evidence which will sustain a recovery in one will sustain a recovery in each of the others as the cases now stand. In every conceivable contingency the rights of each defendant, as against any or all of the plaintiffs, can be fully protected in the consolidated action.

It would be a violation of well-settled rules of procedure to allow these four actions to proceed *pari passu*, for it is manifest that but one action is necessary fully to settle the rights of the parties to all of them, and but one can be allowed to proceed. This is not controverted by either party. The question is purely one of practice. By what procedure shall the whole controversy be concentrated in one action? This might have been accomplished by bringing in all the heirs and both defendants in one of the actions, and dismissing the other three. If we correctly understand the position of counsel for appellants, they insist that this was the only proper practice. Again, instead of dismissing three of the actions, the court might have stayed proceedings therein during the pendency of the other action. We perceive no valid objection to this practice had it been adopted.

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But instead of pursuing either course suggested, the court formally consolidated the four actions into one action, provided for pleadings *de novo* in that action, and in the exercise of its discretion made what seems to be an equitable provision as to the costs of the actions thus consolidated.

If it be conceded that the practice adopted is not technically regular, we do not understand how the appellants could possibly be injured by it, or what advantage would have accrued to them had the court, instead of consolidating the actions, stayed proceedings in or dismissed three of them. If the appellants are not injured by the alleged irregular practice (and we think they are not), it is no ground for reversal of the order of consolidation.

But we do not think the consolidation is irregular. We cannot doubt that the power inheres in a court of equity, in its discretion, to consolidate causes pending therein for the purpose of avoiding a multiplicity of suits and trials, when the consolidation can work no injury to any party. This power is essential to the proper administration of justice, and does not depend upon any statute for its existence. Counsel for appellants claim there are many limitations of the power, indeed deny that it pertains to a court of equity, but we think they take too narrow a view. There is some apparent conflict in the cases on the subject, some of them holding certain limitations on the power which others reject. We shall not attempt to review or reconcile the cases, but must determine the question on what seems to us the better reason. So on these appeals we cannot hesitate to hold that, inasmuch as the results of a consolidation of the four causes must be attained in some manner, and can be attained by consolidation without injury to any party, and inasmuch as the power to consolidate these causes inheres in the court, it was not irregular or erroneous thus to consolidate them.

It may be added that our statute on the subject contains

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no limitation which interferes with the power of the court to make the consolidation. R. S. sec. 2792. The statute reads thus: "When two or more actions are pending in the same court which might have been joined, the court, or a judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one by order." Every condition of the statute is here present. We have two or more actions pending in the same court which might have been joined. A motion is made to consolidate them into one action, and no sufficient cause has been shown to the contrary. The case of *Winninghoff v. Wittig*, 64 Wis. 180, cited on behalf of appellants, is not opposed to the above views. It was there held that cross-actions cannot be consolidated, for the very conclusive reason that in their very nature they cannot be joined in one action. It was not there intended to be held that the parties to each of the actions proposed to be consolidated must necessarily be the same. Such is not our statute, and we find no authorized restriction upon the power of the court in that behalf. The order of consolidation must therefore be affirmed on each appeal.

By the Court.— Order affirmed.

BATAVIAN BANK, Respondent, vs. MCDONALD and another, imp., Appellants.

September 23 — October 14, 1890.

Promissory notes: Extension of time for payment without consent of sureties: Payment of interest in advance.

In an action by a bank against accommodation indorsers of notes, it appeared, among other things, that after maturity thereof the maker paid interest thereon for ninety-three days in advance. He testified that the plaintiff's cashier had agreed to extend the time of payment if the interest was paid in advance. Upon such payment

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being made the dates upon the backs of the notes, showing the times when they became due, were changed to the dates to which interest was so paid, and the notes were placed with others becoming due at those times, and no demand of payment was made until about those dates. The cashier testified that he had told the maker that if he wanted an extension he must get new notes indorsed by the same parties, and that he did not intentionally extend the time. The indorsers had no knowledge of and did not consent to any extension. *Held*, that the evidence did not warrant a verdict against the indorsers, it appearing that there had been an extension which released them.

APPEAL from the Circuit Court for *La Crosse* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action was brought to recover the amount claimed to be due upon two promissory notes, one for the sum of $1,000, bearing date on the 6th of July, 1888, payable in sixty days after the date thereof, with interest after maturity at the rate of eight per cent. per annum, and one for the sum of $1,500, bearing date the said 6th day of July, 1888, payable in ninety days after the date thereof, with interest after maturity at the rate of eight per cent. per annum. Royal L. Reynolds was the maker of each of said notes, and they were made payable to the order of the defendants *McDonald*. The notes were duly indorsed by the said *McDonalds*, and were afterwards delivered by the said Reynolds to the plaintiff bank in the usual course of business, and the same were discounted by said bank for the said Reynolds, and the proceeds of said notes were by said bank credited to said Reynolds. There is no contention made by the respondent, the bank, but that the appellants, the *McDonalds*, indorsed these notes for the accommodation of the said Reynolds, and that the bank knew this fact at the time it discounted the notes for the benefit of said Reynolds. It is freely admitted that the *McDonalds* were in fact the sureties for the said Reynolds for the

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payment of said notes. The only defense made by the said appellants is that the bank, for a valuable consideration received from said Reynolds after said notes by their terms became due and payable, extended the time for the payment of the $1,500 for ninety days after the same became so due on the 6th of October, 1888, viz., to the 8th of January, 1889, and the $1,000 note from the 6th of September, 1888, to the 10th of February, 1889, and that such extension of payment was made without the knowledge or consent of the said *McDonalds*.

The evidence of the extension of time for the payment of these notes on the part of the appellants is the testimony of Reynolds, corroborated and confirmed by the acts of the bank in regard to these notes after the same became due, and the only evidence for the plaintiff that there was no agreement to extend the time of payment by the bank must be found, if found at all, in the testimony of Bentley, the cashier of the bank.

Upon this subject of the extension of time for the payment of these notes, Reynolds, on his direct examination, testified as follows: "Question. On the 18th day of October, 1888, it is alleged in the complaint that you paid the sum of $20.67 on this $1,000 note. It is also alleged that on the 18th day of October, 1888, you paid $31 on the $1,500 note. Under what circumstances did you pay that? Answer. I paid that for the interest in advance on the notes for the extension. Q. For an extension up to what time? A. It was ninety days, if I recollect right. Q. The $1,000 note, it is alleged, you paid the sum of $20.67 on the 18th day of October, 1888, and the sum of $14 on the 6th day of December, 1888. For how many days did the $20.67, paid on the 18th day of October, 1888, extend the note, as you understand it,—the $1,000 note? A. Ninety days, I understood it. I paid this first instalment of interest to Mr. Wing, the collector, I think. That is my recollection. These

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statements of payments, as made in the complaint, are correct. The time I paid up in October, my impression is Mr. Bentley himself figured up the interest, and made out a check for the amount in my small stub-book or check-book I carried in my pocket. I have never found the check that was given that day. I have searched for it. That is the stub of the check-book that I used at that time. The amount of the check given by me on that day was $79.67. This amount covered the interest on this note as well as the interest on other notes. I had a talk with Mr. Bentley at that time, or about that time, in regard to carrying me on this paper. This was the substance of that talk: I wanted him to carry me until I finished the government building, which would be the next July, as I told him the percentage they kept back, which was ten per cent., would be about $10,000, and would be more than enough to pay the notes. He said if I would pay the interest in advance they would carry me. Nothing further was said that I recollect. The payments mentioned in this complaint were paid as interest on these notes. I don't know for how many days this first payment on the $1,000 note paid the interest,— whether ninety or ninety-three. I asked for ninety days, and I suppose they charged for ninety-three. The $14 paid on the 6th of December, 1888, would carry it sixty days. The payment of $31 made on the $1,500 note, October 18th, would carry that note ninety days."

On the cross-examination he testified as follows, viz.: "The conversation I had with Mr. Bentley on the 18th of October, 1888, is the time I spoke to him about carrying me until I got through with the government building. It is hard to give the exact words of the conversation, under the circumstances. We were not then expecting any trouble at all. I think I have, in substance, given all that was said in that conversation. I don't think I can give the exact words, any more than I asked them to extend my paper,

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and he said he would if I paid the interest. I also told him I wanted to be carried till I got through with the government building. I do not recollect whether anybody else was there or not, besides me and Mr. Bentley. No, sir; there was nothing said in that conversation on October 18th about *McDonald Bros.*, that I recollect of. Mr. Bentley did not tell me that he could not give an extension, and if I wanted an extension I must go and get the consent of *McDonald Bros.*, or a new note indorsed by them; and what makes me think it is so is because I never went near them. I am positive, if he had asked me, I should have gone and done it. I don't recollect any such conversation." "I think I had conversations with Mr. Bentley once or twice after the 18th of October, about these notes. I think I extended them once or twice after that. I always consulted him when I did extend them. I know I never extended a note without asking Bentley about it. That has been my custom always in doing that. These two particular notes simply run along after October 18th. I have a memorandum as I understood how the notes were extended. I cannot tell without referring to some minutes I have. I made them as I put them down at the time on the stubs, when I paid the interest on the notes. I drew it off onto this from this paper. This is my handwriting [indicating for interest to pay certain amounts]. When I paid the $79.67, as I understood that was the way I paid interest at that time, I know it was not in my writing or Mr. Bell's, the book-keeper's, but I think it in Bentley's, and that memoranda in my hand is something taken from this."

In addition to the testimony of Reynolds, it was shown that at the time these notes became due, in September and October, the defendants the *McDonalds* were requested to waive notice of protest, and they did so. The notes were presented to the agent of the *McDonalds*,— one the 7th of September, and the other on the 6th of October, 1888,—

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and he was requested to waive protest and notice, and he did so. The agent of the bank said: "Mr. Reynolds was not ready to pay them until he received his estimates, and they would be paid." After that neither the *McDonalds* nor their agent heard anything about these notes until the 8th of January, 1889, when the $1,500 note was presented to the agent of the *McDonalds* for payment. The $1,000 note was not presented for payment to the *McDonalds* at all after the 7th of September. The cashier, Bentley, testified as follows: "'September 7th' was put on the back of the note to indicate the date when the note was due. 'December 9th' was put on the back of the note because the interest was paid until the 9th of December. It was erased because later interest was paid to February 10th. I presume that interest up to December 9th was paid by Reynolds, and up to February 10th by R. L. Reynolds. I suppose it must have been paid by him. I did not receive it myself. I don't know whether Reynolds called at the bank and had a talk with me about the 7th of September in regard to this note. If he did call at the bank about that time, what officer of the bank he would have had the conversation with, in regard to it, would depend, I presume, on what he wanted to say. He had no talk with me in regard to an extension of this note, about that time, to my recollection. We had such conversation, but I think it was later than that. I had a conversation with him in regard to this note, some time after that. We did not talk particularly of this note, but any notes in general. It may have been a month after. It might have been two or three months. It was some time after the note matured. The general conversation had between him and me at that time was to this purport: Mr. Reynolds was speaking about his affairs, and said that, if he could have the money that he then had until he got his final estimate, it would help him through all right, and wanted to know if we would

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allow him to be carried for that amount. I said, in a general way, that perhaps we would if the parties who were indorsers would consent to such an arrangement. There was nothing about the conversation that brings the date of it to my mind. I know it was after the notes matured — after the first note matured, and I think after both. I had no further talk with him on that particular note except as I have stated. I think we had a conversation once or twice. I cannot remember any other conversation definitely, but I have an impression that, in a general way, we had a conversation once or twice about the extension of these notes, but the conversations were substantially the same." "I don't know that I had any conversation with him about the extension of the note at all at the time it fell due. I would generally attend to the extension of paper in the bank, with such a customer as Reynolds. In such a case as that, I would, in almost every instance, attend to it. I am there to control matters of that kind, except in cases where they are so obvious the clerk would understand, but in all doubtful cases it would come to me. In that sense, this was one of the doubtful cases. The note was not extended at the time you are inquiring about." "Question. For what object was the interest paid on it beyond September 7th? Answer. You ask me in regard to the conversation on September 7th, and then you ask why interest was paid. I do not think there was any conversation had on or about September 7th. The note matured September 7th. Our books show whether interest was paid on it at that time. There was some interest paid October 18th, covering interest from September 7th to December 9th. I don't remember whether I had any conversation with Reynolds at that time or not. I cannot tell when these conversations occurred. My best impression is that it was earlier than October 18th. I don't know what was said when he came in to pay the interest

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on these notes. I think he said he would pay so much interest on the note, and I let him." "I did not ask him for anything on the note until December 9th. I did not dun him on the note. I don't know whether I expected him to pay anything on the note until December 9th. I do not think that it operated in my mind as an extension of the note up to that time. The object in taking interest, *if I did not expect to extend the note, was because the bank is always anxious to have its interest paid.* People sometimes pay interest on notes without getting an extension. Taking the two conversations together, I think there was something of that kind in regard to these notes. Mr. Reynolds had asked in regard to an extension on these and other notes, and whenever he spoke to me about such an extension I always made it conditional that he have the consent of the indorsers. I did not attempt personally to get such assent. I made no inquiry of these persons myself. I sent no one to them from the bank in regard to such assent." "I presume Mr. Reynolds paid the $20.67, alleged to have been paid October 18, 1888, on account of the note for $1,000. It was paid for interest from September 7th to December 9th. That was interest on the note for ninety-three days. The amount was arrived at on the basis of interest for that time. I presume Mr. Reynolds paid the $31 alleged in the complaint to have been paid October 18, 1888. It was paid for interest on the note for ninety-three days, from October 7th to January 8, 1889. I can tell what entries or memoranda were made in the books of the bank on the 18th of October, 1888, in reference to these two payments. I haven't the entries here, but in our general cash-book there is an entry like this: 'Interest account; number, giving number of note; Reynolds, $14 or $20.67, whatever the amount is, or $31.' Simply interest with number of the note, and then $31. Nothing further is said in that memorandum. That amount is passed into the general ledger.

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That would go in bulk, with all interest received for the period, into the general ledger under interest account. There would be no entry in any private account. The time for which interest was paid, and when the interest expires, is ascertained by the note itself. I keep these notes in books, under dates to which interest is paid. That is simply a bill-book. No entry would be made in it. They would be put in under the dates the interest expired. I never had any conversation with Reynolds in regard to papers, except those already stated. If Mr. Reynolds had any business transactions with any one else besides myself in the bank, it would very likely have been with the collector. Ed. Wing was the collector. I think the interest was paid to him. It was very likely paid in a check, but I think it was passed to the collector, not when he was out on his rounds, but in the bank. I presume from the 1st to the 9th of December there was a notice sent to Reynolds in regard to this $1,000 note. The notice was similar to the one already filed upon that same blank, and would recite what the blank shows there. Filled out, it would read as follows: 'La Crosse, Wis., with the date. R. L. Reynolds, La Crosse. Your note to *McDonald Bros.*, for $1,000, is payable December 9th. Please present this notice on payment of note. E. E. BENTLEY, Cashier.' "

In another part of his testimony, Bentley, in answer to the question, "Did you at any time give Mr. Reynolds an extension of either of these notes?" (this question was objected to by the defendants),—said: "No, sir." And then said further: "Mr. Reynolds asked for an extension on these notes. I told him, if he desired an extension, it would be necessary to get new notes indorsed by the same parties." "Question. Was there any agreement made with him when any of this interest was paid, except simply that you took the interest?" This was objected to, and witness answered: "No, sir. There was not. Q. Did you ever

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make any promise to extend the time, except they would bring new notes? A. No, sir." This answer was also under objection. Bentley testified further: "Taking the $1,000 note, the first entry on it is the number of the note. The next the entry of the name of the party to the note — '*McDonald Bros.*'— first, and that erased. It was an error that was erased in the bank. Then the word 'due,'— due September 7th. That 'September 7th' is erased, and the word 'due' is left. 'December 9th' is put in after 'September 7th.' That is erased. That was put there by the bank or its officers or book-keeper. Next is 'February 10.' That is not erased. The word 'due' is not erased. 'February 10' is put out to the end of the line. Taking the $1,500 note, it is numbered '23,974,' followed by 'R. L. Reynolds.' Then the words, 'Due, October 7th.' That October 7th is erased, and right after that word 'due,' is 'January 8.' There is an 'N' on that note. It looks as if put there by Ed. Wing,— put there by some one in the bank, I presume. The 'N' is a little mark that the messenger makes to signify that the maker of the note has been notified. There is an 'N' on the other note. I see but one, and that is put in just before the February 10th date. There is one 'N' on each of them. Talking now about the $1,000 note, it was kept, up to the 7th of September, in a little roll in which we kept our notes. It is not a book, although you might call it so. It is a long roll of leather made of the length of the notes, with a tape running through it to spread it into different apartments, and the notes are put in under the date when they become due. After September 7th, and up to December 9th, the note was kept part of the time in one place and part of the time in another; until the interest was paid it was kept in one package, and after the interest was paid it was put back in the package of which I speak. It was put in the general package of notes that fell due on December 9th. In the

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usual course of business of the bank, it would be taken out of that package on the 9th day of December. After the interest was paid on December 9th, it was put under the date of February 10th; I presume in the same book. It would remain there until such time as it became due, on February 10th, unless there was some occasion to make a change. The same would apply as to the dates on the $1,500 note. I did not state that when this $1,000 note first became due I told Reynolds that if he desired an extension of the note he must get a new note indorsed by the parties who had indorsed the other. I stated I told him in general in regard to these notes that if he wished to extend them he would have to do that. My impression is that the matter was mentioned more than once. I do not think that I stated in my direct examination that I never had but one conversation with him on that subject. I think I said I had others. My recollection is, I said I thought we had two or three conversations. *My recollection is that I did not have any such conversation with him on the 18th of October, but I cannot swear positively as to that. My recollection is that it was previous to that. According to my recollection I had no conversation with him on that date.* I could not say whether I had any conversation of that kind with him on December 9th. I cannot tell about that, *but I think in a general way I told him he would have to get another note with indorsers.* I took no steps to notify the indorsers on the notes, further than to have them waive protest. No further steps were taken by me at all." This witness says, in another place in his testimony: "As a matter of fact I never gave an extension intentionally."

The foregoing is substantially all the evidence given on the trial, as to the extension of time for the payment of the notes in question. It is admitted that the appellants had no knowledge of the extension of time for the payment of these notes; and it is further admitted that they

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did not consent to such extension, if such extension was given.

Upon this evidence the learned circuit judge submitted the question of the extension of time to the jury, and by their general verdict in favor of the plaintiff they must have found that no extension of time had been given by the bank or its agent or agents for the payment of either of said notes.

[The defendants *McDonald* appealed from the judgment entered upon the verdict in favor of the plaintiff.]

For the appellants there was a brief by *Losey & Woodward*, and oral argument by *G. M. Woodward.*

For the respondent there was a brief signed by *Miller, Noyes & Miller*, of counsel, and the cause was argued orally by *M. P. Wing* and *B. K. Miller, Jr.* They contended that it was a question for the jury whether the taking of interest in advance was an extension of time and released the sureties. 2 Rand. Comm. Paper, secs. 954–6, 958–9, 963, 965; 2 Dan. Neg. Inst. (3d ed.), sec. 1315; *First Nat. Bank v. Leavitt*, 65 Mo. 562; *St. Joseph F. & M. Ins. Co. v. Hauck*, 71 id. 465; *Reynolds v. Ward*, 5 Wend. 501; *Chrisman v. Tuttle*, 59 Ind. 155; *Dare v. Hall*, 70 id. 545; *Freeman's Bank v. Rollins*, 13 Me. 202; *Crosby v. Wyatt*, 23 id. 156; *Mariner's Bank v. Abbott*, 28 id. 280; *Lime Rock Bank v. Mallett*, 34 id. 547; *Williams v. Smith*, 48 id. 135; *Nat. Bank v. Dow*, 79 id. 275; *Hosea v. Rowley*, 57 Mo. 357; *Coster v. Mesner*, 58 id. 549; *Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 id. 129; *Central Bank v. Willard*, 17 id. 150; *Agricultural Bank v. Bishop*, 6 Gray, 317; *Haydenville S. Bank v. Parsons*, 138 Mass. 53; *Hume v. Mazelin*, 84 Ind. 574; *Crossman v. Wohlleben*, 90 Ill. 537; *Meiswinkle v. Jung*, 30 Wis. 361; *Irvine v. Adams*, 48 id. 468; Brandt, Sur. 442, sec. 329; *Wyke v. Rogers*, 1 De Gex, M. & G. 408; *Sohier v. Loring*, 6 Cush. 537; *Kearsley v. Cole*, 16 Mees. & W. 128; *Rucker v. Robinson*, 38 Mo. 154.

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TAYLOR, J. After a careful consideration of all the evidence in this case, we are very strongly impressed that the verdict is not supported by the evidence, and ought to have been set aside by the learned circuit judge on the motion of the appellant. Everything which was said and done by the bank officers at the time the interest in advance was paid on these notes on the 18th of October, 1888, shows very clearly that not only Mr. Reynolds understood that in consideration of the payment of such interest the time for the payment on such notes should be extended, but the bank or its agents so understood it, and gave Reynolds the right to so understand it. In the first place, Mr. Bentley, the cashier, does not in his testimony in any way contradict Mr. Reynolds as to what conversation was had between them at the time the interest was paid; and Reynolds says: "Bentley told me if I would pay the interest in advance they would carry me." Again, he says: "I asked them to extend my paper, and he said he would if I paid interest." As affirming the truth of the statement made by Reynolds, we have the fact that the indorsement on the back of the notes of the time when the same would become due was changed on the $1,000 note from September 7, 1888, to December 9, 1888, and then again from December 9, 1888, to February 10, 1889, and on the $1,500 note from October 7, 1888, to January 8, 1889. This was not only done immediately upon the payment of the interest in advance, but the notes were placed with other notes becoming due at the same time, to wit, December 9, 1888, and January 8, 1889; and it is fully admitted that thereafter no call, either upon Reynolds or the appellants, for the payment of these notes was made until the $1,500 note was about due, January 8, 1889, and until the $1,000 note was about due, February 10, 1889. All the acts and conduct of the bank officials tend very clearly to establish the contention of the appellants that the time for the payment of these notes was extended as claimed by them.

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To our minds there is nothing in the evidence of Bentley, the cashier, which tends to overturn the conclusion which follows from the evidence on the part of the appellants. His statements that he did not intentionally extend the time certainly cannot be permitted to do away with the effect of the facts proven, which clearly establish the fact that an extension was granted. As to his other answer to the question, "Did you at any time give Reynolds an extension of either of these notes?" that he "did not," it is probable that the question should have been ruled out by the court; but, admitting that it was a proper question to be answered by the witness, his answer to the next question propounded shows that he based his first answer upon his claim that, at some time before this interest was in fact paid, he had had a general conversation with Reynolds about extending his notes generally; and that in such conversation he had told Reynolds that if he wanted any extension he must get new notes indorsed by the same parties. Bentley nowhere in his evidence pretends to say what conversation was had when the interest was paid on these notes, but says he does not recollect what was said. The testimony of Reynolds as to what was said then is not overcome by an allegation that something else was said at another time. It seems to us very clear that having taken the interest from Reynolds in advance upon these notes without requiring any consent from the indorsers, or without requiring Reynolds to get the notes renewed by the indorsers, is strong evidence tending to estop the bank from insisting that there was no extension of time, and that, after receiving such interest in advance, followed by the other acts of the bank in regard to these notes, no court would sustain an action on them against Reynolds until the time for which the interest had been paid in advance had expired, unless the bank could show affirmatively and clearly that, notwithstanding such receipt of interest in ad-

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vance, the bank reserved to itself the right to bring an action at any time on such notes within the time for which the interest had been paid. The payment of the interest in advance, and the receipt of the same by the bank, without further proof, would not only justify a court in holding that the time for payment had been extended, but standing alone would be conclusive as to the extension. Brandt, Sur. § 305, and cases cited; *Blake v. White*, 1 Younge & C. 420; *Crosby v. Wyatt*, 10 N. H. 323; *Wakefield Bank v. Truesdell*, 55 Barb. 602; *Siebeneck v. Anchor S. Bank*, 111 Pa. St. 187; *Randolph v. Fleming*, 59 Ga. 776; *Woodburn v. Carter*, 50 Ind. 376; *Warner v. Campbell*, 26 Ill. 282; *People's Bank v. Pearsons*, 30 Vt. 711; *Rose v. Williams*, 5 Kan. 483; *Christner v. Brown*, 16 Iowa, 130.

This being the rule, there does not seem to us to be any evidence in this case which should be permitted to defeat the appellants' claim that the time for payment had been extended without the assent of the sureties. It is possible that the cashier, Bentley, did not intend to release the sureties on the note, but it seems to us very clear that he consented to an extension of the time of payment to Reynolds when he received the interest in advance, and if he so extended the time to Reynolds with no intent to discharge the sureties, still the sureties are discharged in law by the extension of time of payment to the principal debtor without their assent, and the intention of the cashier cannot change the result.

We think there is a greal deal of good, sound sense in the remarks of Lord Baron LYNDHURST, in the case of *Blake v. White*, above cited. He says: "If it appeared simply that six months' interest had been given, what could the imagination suggest but a contract *ipsissimis verbis* that the creditor should not sue for that time. Besides, the interest being paid, would a court of equity endure that the creditor should put that interest into his pocket, and the next

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day sue for the principal?" We think, clearly, neither a court of equity or law would permit such a proceeding unless there was the clearest proof that such was the agreement between the creditor and his interest-paying debtor at the time the interest was paid and received in advance. We are satisfied that there is no evidence in this case which ought to sustain a verdict that such agreement was made between the parties, or that there was any such understanding between them when such interest was paid and received in this case.

We think the learned circuit judge should have set aside the verdict in this case on the ground that it was entirely unsupported by the evidence.

By the Court.— The judgment of the circuit court is reversed, and the case is remanded for a new trial.

OATMAN, Assignee, Respondent, vs. BATAVIAN BANK, Appellant.

September 23 — October 14, 1890.

Setoff: Claims not due: Banks: Voluntary assignment.

A bank cannot set off, against a deposit to the credit of an assignor for the benefit of creditors, a note held by it against him but not due at the time of the assignment.

APPEAL from the Circuit Court for *La Crosse* County.

Action by the assignee of Royal L. Reynolds to recover the amount of a deposit in the defendant bank to the credit of said Reynolds. The facts are sufficiently stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief signed by *Miller, Noyes & Miller*, of counsel, and oral argument by *M. P.*

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Wing and *B. K. Miller, Jr.* To the point that a bank has an absolute right to apply a deposit of an insolvent to the payment of his paper whether due or not, they cited *Ex parte Howard Nat. Bank*, 2 Lowell, 488; 1 Morse on Banks (3d ed.), secs. 329, 337; *Ford's Adm'r v. Thornton*, 3 Leigh, 695; *Camden Nat. Bank. v. Green*, 45 N. J. Eq. 546; *Carr v. Hamilton*, 129 U. S. 255; *Skunk v. Merchants' Nat. Bank*, 19 Chi. Leg. News, 83; Waterman, Setoff (2d ed.), sec. 128, p. 149.

For the respondent there was brief by *Fruit & Brindley*, and oral argument by *John Brindley*.

ORTON, J. On the 2d day of January, 1889, one Royal S. Reynolds, being insolvent, made a voluntary assignment of all his property to the respondent, for the benefit of his creditors. At that time he had on deposit in the appellant bank, to his credit, the sum of $773.13. At the same time the said bank held and owned the promissory note of said Reynolds for $1,000, executed by him to one S. Martindale, and indorsed to said bank by said Martindale, on the 3d day of July, 1888, to become due twenty days after date, with interest at eight per cent. per annum, and to bear ten per cent. interest after due. The time of payment of said note had been extended from time to time by the said Reynolds paying the interest thereon in advance to such times; and finally, on the 6th day of December, 1888, the said Reynolds paid the interest thereon and the time of payment thereof was extended to the 31st day of January, 1889, so that at the date of said assignment said note was not yet due.

The respondent assignee demanded of the bank the payment of said deposit, and the bank refused, claiming, and still claims in this suit, that the note set off and canceled the deposit. Whether the said note had been so extended was a question of fact on the trial, but the jury found that

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it had been, and, as we think, on sufficient evidence. The bank held and owned other notes of the said Reynolds at the time the assignment was made, and they also had been extended beyond the date of the same, in the same manner of the said Martindale note, so that none of them were yet due. These other notes are not material, because the Martindale note is sufficient to cancel the said deposit, if it is allowed as a setoff thereto. The jury virtually found that none of the notes were due. The only remaining question, therefore, is one of law,— whether the Martindale note (or any of them) not being due at the date of the assignment, was a proper setoff against the amount of said deposit. The defendant requested the court to charge that it was, and the court instructed the jury that it was not if it was not due at the date of the assignment.

The learned counsel of the appellant contends that by virtue of a bank's equitable lien upon the deposit of its customer, as security for the payment of his indebtedness to the bank, and by virtue of an equitable setoff of one against the other in case of the customer's insolvency, a court of equity will decree such an application of what he owes to the bank, due or not due, although it might not be strictly a legal setoff. There is not only plausibility in this claim, but it seems to be sustained by some respectable authorities. This was never allowed at common law, but it seems to have long prevailed in cases of bankruptcy, according to *Carr v. Hamilton*, 129 U. S. 255. It is difficult to see why a bank should have this exceptional advantage over an individual creditor. By our statute (R. S. sec. 4258) the setoff in all cases must be due, and it makes no exception in favor of banks or on account of insolvency; and by our law of voluntary assignments all creditors must be treated alike, and their rights are fixed at the date of the assignment. *Union Nat. Bank v. Hicks*, 67 Wis. 189. In *Armstrong v. Pratt*, 2 Wis. 299, the defendant sought to set off

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a debt which had not matured at the time of the death of the intestate against a claim the estate held against him as one of the assets of the estate. This was not allowed, for the reason that it would affect the equal distribution of the assets of the estate, and tend to the prejudice of the claims of other creditors. The same reasons would obtain in cases of voluntary assignment. If the estate in that case had been insolvent, then the distribution of the assets must have been *pro rata* and equal to the creditors, for the same reason that the assets of an insolvent assignor must be so distributed. The cases are alike in principle. This is as near as this court has ever decided the question involved in this case.

There might be special equities growing out of the transaction itself, through fraud or matters of trust, that might make an exception in favor of a bank, but mere insolvency of the debtor is no ground for such an exception; and, if the insolvent debtor has made an assignment for the benefit of his creditors, the reason is strong the other way. The learned counsel of the appellant cites 1 Morse, Banks, § 337, to the general doctrine that, "for any indebtedness accruing from the customer, the bank has the right of setoff," etc. In *Jordan v. Nat. S. & L. Bank*, 74 N. Y. 467, the court says that Mr. Morse has stated the rule too broadly, and that the bank has a lien on the funds of the depositor in its possession for the balance of the general account, *if that balance is due and payable.* The following authorities are cited in the brief of the learned counsel of the respondent as sustaining the rule that the demand claimed to be a setoff in such a case must have matured before the date of the assignment: *Bradley v. Angel*, 3 N. Y. 475; *Beckwith v. Union Bank*, 9 N. Y. 211; *Myers v. Davis*, 22 N. Y. 489; *Martin v. Kunzmuller*, 37 N. Y. 396; *Roberts v. Carter*, 38 N. Y. 107; *Jordan v. Nat. S. & L. Bank*, 74 N. Y. 467; *Newcomb v. Almy*, 96 N. Y. 308; *Richards v. La Tourette*,

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119 N. Y. 54; *Fuller v. Steiglitz*, 27 Ohio St. 355; *Lockwood v. Beckwith*, 6 Mich. 168; Burrill, Assignm. § 403; Pom. Rem. 185–204. There are many cases in Michigan that hold this rule, unless some special equities other than that growing out of insolvency should make an exception. It is correctly claimed that this is the rule by a great preponderance of the authorities. The learned counsel of the appellant cites but few cases, and some of them hardly dispute this rule. The rule that places a bank under the law on equality with all other creditors in such a case seems to be reasonable. The circuit court ruled correctly, and the jury properly found for the plaintiff.

By the Court.— The judgment of the circuit court is affirmed.

TUTEUR, Administrator, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

September 24 — October 14, 1880.

Death caused by negligence: Measure of damages.

1. In assessing damages for the death of a person caused by negligence, where the amount recovered will belong to the children of the deceased, the jury may consider the number of years the deceased would probably have lived, the reasonable expectation of the amount of his or her property being increased, and the reasonable expectation of pecuniary benefit to the children, or any of them, by way of support or otherwise, had the deceased continued to live.
2. The fact that the children were all of age when their mother's death was caused by negligence, would not preclude a recovery for the loss of such pecuniary benefits as they had a reasonable expectation of securing from her additional accumulations.

APPEAL from the Circuit Court for *La Crosse* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an action for damages for an injury to the plaint-

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iff's intestate, Johanna Ewe, while she was a passenger on a train of cars of the defendant in Trempealeau county, caused by a collision at a railroad crossing, September 19, 1888, and from which she died September 25, 1888. She was a widow at the time, her husband having died about four years before. She left, her surviving, three children, to wit, Robert, about twenty-eight years of age; Bertha, a married daughter, about twenty-six years of age; and Lillie, an unmarried daughter, who was twenty-one years of age September 12, 1888. The defendant answered, and at the close of the trial the jury returned a special verdict to the effect that the injury to the plaintiff's intestate was caused by an accident at the time and place stated, through the negligence of the defendant, and that such injuries caused her death; that she probably would have lived twelve years and nine months longer had it not been for such injury; that there was a reasonable expectation that her earnings would have increased the property left by her at her death, had she continued to live, to the amount of $2,500; that her said children, or some of them, had reasonable expectations of pecuniary benefit from the continuance of her life by way of support or gifts, and that the value of such expectation was $2,500; that the pecuniary loss of such children by reason of her death was $2,500. Thereupon the defendant moved for a new trial on the grounds, among others, that said findings as to such expectation and loss of pecuniary benefit were inconsistent, and the damages excessive. Upon the hearing of that motion, February 25, 1890, it was ordered by the court that said verdict be, and the same was, thereby set aside, and a new trial granted to the defendant, without terms, unless the plaintiff, within three days thereafter, remitted all damages in excess of $1,000; that, on filing such remission in writing, the clerk was thereby directed to enter judgment for the plaintiff for $1,000, besides costs to be taxed. Afterwards, and on Feb-

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ruary 28, 1890, and within said three days, the plaintiff elected to remit all damages in excess of $1,000, and thereupon judgment was entered in favor of the plaintiff and against the defendant for the sum of $1,000 damages, and costs. From that judgment the defendant appeals.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *C. H. Van Alstine.*

For the respondent there was a brief by *Fruit & Brindley*, and oral argument by *John Brindley.*

CASSODAY, J. The findings of the jury to the effect that the plaintiff's intestate was injured by the negligence of the defendant, and that such injury resulted in her death, as stated, seem to be supported by the evidence. She was, at the time, a widow sixty-one years of age, engaged in keeping a boarding-house at La Crosse, and had some twenty boarders, to some of whom she furnished rooms and lodgings. There is evidence tending to prove that she was in good health, and for years had been doing a profitable business, keeping boarders; that she made some money besides supporting and clothing her youngest daughter and occasionally giving small amounts of money to her son. The court charged the jury that the plaintiff could only recover the actual pecuniary loss which the children had sustained by reason of their mother's death. Of course it was impossible to definitely prove the exact amount of such loss. *Railroad Co. v. Barron*, 5 Wall. 90. The statute expressly authorized the jury to give such damages, not exceeding the amount specified therein, as they deemed fair and just, in reference to the pecuniary injury resulting from such death to the children named. R. S. sec. 4256. This certainly authorized the jury to take into consideration the number of years the intestate would probably have lived had it not been for the injury; the reasonable expectation

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of the amount of her property being increased; and the reasonable expectation of pecuniary benefit to the children, or any of them, by way of support or otherwise, had the deceased continued to live without such injury. *Castello v. Landwehr*, 28 Wis. 522; *Ewen v. C. & N. W. R. Co.* 38 Wis. 613; *Johnson v. C. & N. W. R. Co.* 64 Wis. 425; *Lawson v. C., St. P., M. & O. R. Co.* 64 Wis. 447; *Kaspari v. Marsh*, 74 Wis. 562. The charge to the jury appears to have been full and fair, and did not authorize the jury to go outside of the limitations thus fixed. It is true, the damages found by the jury were in excess of the amount authorized by the evidence, but such amount was reduced by the order of the court and the voluntary action of the plaintiff, in the manner indicated. The amount of the damages so reduced seems to be sustained by the evidence.

Ordinarily parents expect no pecuniary benefits or advantages from their children after they become of age; and, hence, in case of the death of a child, it has been held necessary to show that the parent was in an indigent or dependent condition, in order to recover. *Potter v. C. & N. W. R. Co.* 21 Wis. 372, 22 Wis. 615; *Ewen v. C. & N. W. R. Co.* 38 Wis. 622; *Johnson v. C. & N. W. R. Co.* 64 Wis. 431; *Wiltse v. Tilden*, *ante*, p. 152. But a more liberal rule obtains in an action to recover damages for the death of a parent, for the benefit of a child. Ordinarily children are expected to survive their parents, and to inherit whatever property they leave undisposed of, and to transmit their own property to their own children. The mere fact that the children in the case at bar were all of age at the time of their mother's death did not preclude them from recovering for the loss of such pecuniary benefits as they had a reasonable expectation of securing from additional accumulations of their mother, had she not been injured. These principles seem to be recognized, if not asserted, by some of the adjudications. *Kelley v. C., M. & St. P. R. Co.* 50

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Wis. 381; *McKeigue v. Janesville*, 68 Wis. 50; *Kaspari v. Marsh*, 74 Wis. 562; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566; *McIntyre v. N. Y. C. R. Co.* 37 N. Y. 287; *Walter v. C. D. & M. R. Co.* 39 Iowa, 33. We find no error in the record.

By the Court.— The judgment of the circuit court is affirmed.

LONG and others, Respondents, vs. DAVIDSON, imp., Appellant.

September 24 — October 14, 1890.

Logs and timber: Conversion: Estoppel: Evidence.

1. Plaintiffs contracted to sell certain lands to the defendant T., giving him the right to cut the timber thereon, the logs, however, to remain their property until full payment of the purchase price. The contract provided that T. should place a certain mark upon the logs. T. delivered some of such logs, with others cut from other lands, to the defendant D., who converted them to his own use and, in an action for the conversion, claimed that plaintiffs were estopped to assert their ownership as against him because the mark which they had caused to be placed upon such logs was the same as his private recorded log mark, and their logs were, therefore, not distinguishable from others rightfully cut for him by T. It did not appear that plaintiffs had any notice that such mark was D.'s recorded log mark, and the evidence was conclusive that D. was not misled by the mark on their logs, and that he knew all about their contract with T. before he obtained possession of such logs. *Held*, that plaintiffs were not estopped, but were entitled to recover the value of the logs, not exceeding the amount of the unpaid purchase money due from T.
2. The insolvency of T. before the commencement of the action did not affect plaintiffs' right to recover from D., although for a long time prior to such insolvency T. had been in default upon the land contract and plaintiffs had not sued him thereon.
3. The contract between plaintiffs and the defendant T. was admissible in evidence as against the defendant D.

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APPEAL from the Circuit Court for *Jackson* County.

Action for the conversion of a quantity of pine saw-logs of the alleged value of $4,800, which had been cut by the defendant Thompson upon the plaintiffs' lands, and which are alleged to have been, at the time of their conversion by the defendants, in the possession of the plaintiffs on Levis creek in the town of Albion, Jackson county.

The defendant Thompson did not answer the complaint. The defendant *Davidson*, besides a general denial, alleged that by a written contract made in October, 1886, the said Thompson agreed to deliver to him six million feet of pine logs, to be cut from certain described lands (not including any of the plaintiffs' lands) during the following winter, to be hauled to convenient landings on Levis creek, and to be driven into Black river at the mouth of said creek on the first waters in the spring of 1887; that said logs were to be marked with *Davidson's* private recorded mark, thus: end mark A D V, bark or side mark, N Y X X X, and were to be the property of *Davidson* as fast as they were cut; that Thompson had no authority to cut or put in for *Davidson* any logs bearing such marks except such as were to be cut from the lands described, and if any logs cut from plaintiffs' lands and bearing said marks were put into Levis creek, they were cut and put in and intermingled with *Davidson's* logs without his consent or permission, and were so placed and put in with *Davidson's* logs as to be unavoidably driven out of Levis creek and into Black river; that *Davidson*, not knowing that any such logs were put in, may have, as of necessity, caused or allowed them to be floated into Black river along with his other logs, but that he had in no way exercised authority, control, or ownership over any logs or timber whatever, coming from Levis creek, except such as were marked with the mark aforesaid, which Thompson was to put upon *Davidson's* logs.

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Before the trial commenced *Davidson* asked leave to amend his answer by setting up the fact that, prior to the commencement of the action, Thompson had made a voluntary assignment for the benefit of his creditors. The court refused to allow the amendment.

The jury returned a special verdict to the effect that 900,000 feet of the plaintiffs' logs came to the possession of the defendant *Davidson;* that such logs were worth $5 per thousand feet; that the value of the timber before cut — the stumpage — was $2.25 per thousand feet; and that $1,827.64 of the purchase money of the lands from which such logs were cut remained unpaid and due the plaintiffs. Upon this verdict judgment was rendered in favor of the plaintiffs for $1,827.64 and costs. The defendant *Davidson* appealed. Other facts are stated in the opinion.

For the appellant there were briefs by *Losey & Woodward* and *Fruit & Brindley*, and oral argument by *G. M. Woodward* and *John Brindley*.

For the respondents there was a brief by *Bleekman, Tourtellotte & Bloomingdale*, and oral argument by *A. E. Bleekman* and *F. A. Bloomingdale*.

Cole, C. J. It cannot well be denied that the plaintiffs originally owned the timber from which the logs in controversy were cut. They were the owners of the lands and, of course, of the standing timber upon them. In March, 1887, they entered into the contract with Thompson by which they agreed to sell the lands to him for $2,000, and gave Thompson the right to enter upon the lands, and cut the timber into saw-logs, and haul the logs to Levis creek, and bank the same; but the contract provided that the logs should be and remain the property of the plaintiffs until the full performance of the contract by Thompson, or until the $2,000 were paid. The contract provided how the logs cut from these lands should be marked; that is, for a bark or side mark, with the letters N Y X, and for an end mark,

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with the letters A D V, stamped thereon, and the letter P was to be marked on the end with chalk. It is not claimed that this chalk mark was put on the logs, but the other marks were put on, and it is said that they were the same marks as Thompson put upon the logs which he furnished on his contract made with the defendant *Davidson* in October, 1886. In fact, under this latter contract, the logs were to be marked A D V for the end mark, and N Y X X X for the side mark, and, for convenience, it was verbally agreed that two X's should be omitted from the side mark, and these two letters were left off from nearly all the logs which were delivered on the *Davidson* contract; so the logs which were cut from the plaintiffs' lands, and those under the *Davidson* contract, could not be distinguished from each other by the marks. The logs were all banked upon the same stream, and were intermingled in running and coming to the possession of *Davidson*. Indisputably *Davidson* has had logs which belong to the plaintiffs, which were cut from their lands, and why should he not pay for them? We perceive no reason or principle of law, which, upon the established facts, exonerates him from paying at least to the extent of the unpaid purchase money due for the lands from which the logs were cut, and this is all they did recover in the action.

But it is said that the acts and conduct of the plaintiffs have been such as ought, both in law and equity, to estop them from asserting ownership in the logs as against *Davidson*. It is insisted they should not have authorized the logs cut from their lands to be marked with the private recorded log-mark of *Davidson*, so that the different logs could not be readily distinguished. In answer to this objection it is said the evidence fails to show that the plaintiffs knew what *Davidson's* log-mark was, or that they authorized it to be placed on their logs; and such is the effect of the testimony, as we understand it. There is no ground for saying that the plaintiffs' logs were marked with *Davidson's* private re-

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corded mark, or that they knew anything about his contract with Thompson. As we have said, if the plaintiffs had read that contract, they would have seen that it clearly provided that the logs furnished under it should bear a different mark from the one which was placed on their logs. What *Davidson's* legal recorded log-mark was, when the plaintiffs made their contract with Thompson, does not satisfactorily appear from the evidence. He claims that it is the same as the mark authorized to be put on the plaintiffs' logs, but that fact is not established by the certificate of the lumber inspector which was introduced in evidence. *Davidson* himself testifies that he had recorded and used a mark in his contract,— N Y X X X, side mark,— but when he recorded a different side mark does not appear. The presumption is very strong that his recorded side mark was N Y X X X when he made his contract with Thompson for the delivery of the 6,000,000 feet, because that was the side mark which was to be placed on the logs under that agreement. So we can see no ground for saying that the plaintiffs are estopped from asserting their rights in the logs, because of the manner they were marked. It certainly does not appear that they had any notice or knowledge that the mark put upon them was *Davidson's* recorded log-mark, and the inference is very cogent that it was not; and we think the evidence is conclusive that *Davidson* was not misled by the mark on the plaintiffs' logs, and that he knew all about their contract with Thompson before he obtained possession of them. He knew all about the plaintiffs' title, and that the logs would remain their property until the purchase price of the lands was paid. He does not therefore stand before the court, and cannot be regarded, as an innocent purchaser of the plaintiffs' property for value; nor have the plaintiffs done any act which should preclude them from asserting their ownership of the logs.

We are at a loss to see the materiality of the proposed

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amendment, in regard to the assignment and insolvency of Thompson before the commencement of this action. How can that fact affect the plaintiffs' right to recover the value of their property? It is true Thompson was in default on his contract with the plaintiffs. He had failed to make payments as that contract provided, but the plaintiffs had not brought suit against him as they might have done; but how this forbearance on their part raised any equities in favor of *Davidson* we cannot understand. It is sufficient to say that *Davidson* knew all about the plaintiffs' claim to the logs before they came into his possession. He had ample opportunity to protect himself against loss by reserving money on his contract with Thompson. It does not appear that he has been in any way injured by the delay in suing Thompson.

We are also unable to see how the defendant could have been prejudiced by the admission in evidence of the contract between Thompson and the plaintiffs. That contract would show that Thompson was not a trespasser in cutting their timber; it would also show the extent of their interests in the logs. The plaintiffs did not recover the full value of the logs, but only the amount of the unpaid purchase money due on this contract. That was about the value of the stumpage, as found by the jury. Many of the questions in this case were considered and passed upon in *Lillie v. Dunbar*, 62 Wis. 198, and need not be further discussed. It is very clear to our minds that Thompson could give *Davidson* no greater or better title to the logs than he had under his contract, and, as the logs were to remain the property of the plaintiffs until the lands were paid for, it seems plain they are entitled to recover to the extent of the purchase money. We see no error in the case, and affirm the judgment.

By the Court.— Judgment affirmed.

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NEWTON, Appellant, vs. WHITNEY and another, Respondents.

September 24 — October 14, 1890.

(1) Instructions to jury. (2) Jurors: Change of opinion.

1. Where the jury was instructed that a certain issue was the only one in the case, a party claiming that there were other issues should have called the attention of the court thereto and asked further instructions. An exception to the instructions on the ground that they did not embrace all the questions at issue is not sufficient.
2. A change of opinion by a juror on consultation with his fellows in the jury-room is not cause for setting aside the verdict; and though remarks made by jurors, immediately after the jury had retired, indicated a misunderstanding of the case at that time, it will be presumed that such misapprehension was corrected before the verdict was agreed upon.

APPEAL from the Circuit Court for *Monroe* County.

Action to recover the sum of $625 alleged to have been advanced by plaintiff's assignor, Orin I. Newton, to the defendants as partners. The facts will sufficiently appear from the opinion. The trial resulted in a verdict for the defendants, and from the judgment entered thereon the plaintiff appealed.

For the appellant there was a brief by *Bleekman, Tourtellotte & Bloomingdale*, and oral argument by *A. E. Bleekman* and *F. A. Bloomingdale*.

For the respondents there was a brief by *Morrow & Masters*, and oral argument by *J. M. Morrow*.

ORTON, J. On the 30th day of March, 1884, the appellant's assignor, Orin I. Newton, advanced to the respondents the sum of $625, to be used by them in part payment for the purchase by them of a printing press and materials for use in their business, and the respondents agreed to repay the said advancement in printing work for the said Orin I. Newton, at the rate of $15 per month, until it was all repaid, with ten per cent. interest thereon. The press

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was procured, and the respondents for a time did such printing work for said Newton, but, as the appellant claims, in such unworkmanlike manner as to have been an actual damage to the said Orin I. Newton or the appellant and worthless. The appellant or his said assignor therefore rescinded and terminated said special agreement and demanded of the respondents the repayment of said advancement in money, which being refused, the appellant, the assignee of Orin I. Newton, has brought this suit for the recovery thereof.

It will be observed that the only question of fact in this statement was whether the respondents did such printing work in such an unworkmanlike manner as to justify the appellant or his assignor in so rescinding such contract, and entitle him to recover in this action. The circuit court substantially instructed the jury that such was the main issue, and that if they found for the appellant they should deduct what had been paid by sufficient printing work before the rescission of the contract, and render their verdict for the residue of said advancement.

The answer alleged that, on the 20th day of May, 1884, the copartnership between the respondents was dissolved, and that the defendant *Barton W. Perry* assumed the performance of said agreement with the assent of the said Orin I. Newton, and that the said *Perry* continued to do said printing in a satisfactory and workmanlike manner. This matter was entirely ignored in the instructions of the court to the jury, and the appellant failed to ask any instruction on that question. The learned counsel of the appellant now claims that he had the right to rescind said agreement and demand the repayment of said advancement in money, because he had the right to the personal labor and skill in printing of both of the respondents, and particularly of the respondent *Guy Whitney*. That was a question the jury could not have considered, for the court instructed

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them that the only question for them to consider was whether the respondents did such printing in a proper and workmanlike manner.

Another matter in proof, and which is not referred to in the instructions of the court as having any bearing upon the issue, was concerning the taking away of the printing-press by the said Orin I. Newton, which prevented the respondents from doing such printing work under the contract, until it was reclaimed by them in an action of replevin. The court was not asked to instruct the jury upon such matter.

This matter and the dissolution of the partnership of the respondents were probably ignored by the court in stating the issues to the jury, because of their immateriality. But whatever the reason may have been, if either party desired any further instructions, they should have been requested on the occurrence of such an omission. To except to the instructions on the ground that they did not embrace all the questions at issue is not sufficient. When the court stated to the jury that the only question was the right of the appellant to rescind the contract and sue for the money on the ground that the printing was not done in a workmanlike manner, and both parties sat silently by and allowed the case to go to the jury on that question alone, without asking further instructions or calling the attention of the court to any omission in such statement, their assent to the statement that such was the only issue ought to be implied. Exceptions would only go to the correctness of such instructions on such single issue, or as far as they went. *Corcoran v. Harran*, 55 Wis. 120; *Lachner v. Salomon*, 9 Wis. 129; *Karber v. Nellis*, 22 Wis. 215; *Weisenberg v. Appleton*, 26 Wis. 56. It would seem that the court very properly omitted any reference to these matters in the instructions, as immaterial to the real merits of the case. The testimony as to the manner in which the printing work was

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done was conflicting, and the jury, in finding for the defendants, must have found that it was well and properly done under the contract. The question was one particularly within the province of the jury, on conflicting evidence, and this court would not be warranted in disturbing their verdict upon it if there was any evidence to justify it, and there appears to have been such evidence.

The learned counsel for the appellant contends that it was error for the court instead of the jury to determine what the contract was. There does not seem to have been any material difference between the parties, as witnesses, as to what the contract was, and it appears from the testimony that the reason for rescinding the contract was that the respondents did not do the printing work in a proper manner, as the court instructed the jury. The evidence claimed to have been irrelevant evidently did not prejudice the jury or affect their verdict, and the evidence claimed to have been improperly admitted was quite immaterial to the merits of the case. The instructions of the court appear to have been unexceptionable and correct. The case was very fully and ably tried on both sides, and, if any of the jury failed to have a clear perception of the real issues and the bearing of the testimony, it must have been because the case was burdened with much irrelevant and immaterial matters on both sides, tending to embarrass and confuse the case. The court very properly placed the real issues before the jury in short and very clear instructions which they could not fail to understand.

The ground of the motion for a new trial, consisting of the improper conduct of some of the jury, was clearly insufficient. The remark of the juror in the hearing of the sheriff was made by him in the jury-room, and addressed to his fellow jurymen. If it indicated that his opinion then was that the plaintiff ought to recover, the verdict, in which he soon after concurred, showed that he had changed

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that opinion, as he had the right to do, and it must be assumed that he so changed his opinion for reasons satisfactory to himself. His first opinion seems to have been very hastily if not inconsiderately expressed as soon as he reached the jury-room. It would not do to hold that a change of opinion by a juror, on consultation with his fellows on any question, is misconduct or cause for setting aside the verdict and for a new trial. When that juror said, "*Newton* is entitled to a judgment," some of the jurors said: "If we give him a judgment he will have a judgment and the *press* too, and we must not do that." That remark of other jurors, or another juror, might have indicated a misunderstanding of the case at that time, but we cannot assume that he finally acted upon it, but must rather presume that it was correct, and that his verdict was based upon a correct understanding of the case. Both parties were equally at fault in importing into the case this matter of the printing press partly purchased with Newton's money. It really had nothing to do with the issue on the pleadings, and served no purpose but to confuse the jury. It is sufficient that the verdict was a proper one and warranted by the evidence. To invade the jury-room, and base a motion for a new trial on the loose and informal discussions of the jury, would be a very uncertain and dangerous practice.

There does not appear to have been any material error in the case, or any error affecting the real merits or justice of the case.

By the Court.—The judgment of the circuit court is affirmed.

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MUENCHOW, Respondent, vs. ROBERTS, Appellant.

September 25 — October 14, 1890.

Land contract: Payment to be made in crops: Breach by vendor: Measure of damages.

The vendee in a land contract was to raise oats on one third of the land for five years, and to deliver the five crops to the vendor in full payment for the whole tract. He was to have immediate possession of the whole tract, and was to pay the taxes. The vendor refused to give him possession of the land, and wholly failed to perform the contract on his part. *Held*, that the measure of damages for such breach is the value of the land less the contract price, such price in this case being the necessary expenses of raising the five crops of oats and delivering the same to the vendor. The value of the use of the remaining two thirds of the land should not be added to the value of the land, to increase the damages; nor should the taxes to be paid by the vendee be included with the cost of raising the oats, to reduce the damages.

APPEAL from the Circuit Court for *La Crosse* County.

On April 9, 1883, the parties entered into a contract in writing, under seal, for the sale by the defendant to plaintiff of 300 acres of land in La Crosse county. The plaintiff agreed to raise oats on a specified portion of the land, said to contain 100 acres, in each year for five years then next ensuing, and to deliver the same to defendant at his elevator in Bangor. It was also agreed that said five crops of oats when so delivered should be full payment for the land. The value of the land is not otherwise specified. The contract gives the plaintiff the possession of the land from its execution, and requires him to pay the taxes thereon from that time. It further provides that when payment therefor is fully made, as aforesaid, the defendant shall convey the land to plaintiff by deed of warranty.

This action was brought to recover damages for the entire breach of the contract by the defendant. It was alleged in the complaint that two days after the execution of the

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contract, and several times thereafter, the defendant refused to allow the plaintiff to enter into possession of the land, and that the defendant has failed to perform the stipulations on his part contained in the contract.

There was a controversy on the trial as to whether the plaintiff or the defendant refused to execute the contract, or whether it was rescinded by mutual consent. The jury found for the plaintiff, and assessed his damages at $500. By so finding they necessarily found that the defendant rescinded the contract without the consent of the plaintiff. It is unnecessary to state the testimony. The rulings of the court on the trial are stated in the opinion. The defendant appeals from a judgment against him pursuant to the verdict.

For the appellant there was a brief by *G. C. Prentiss*, attorney, and *Bleekman, Tourtellotte & Bloomingdale*, of counsel, and oral argument by *F. A. Bloomingdale*.

For the respondent there was a brief signed by *Winter, Esch & Winter*, and oral argument by *John J. Esch*.

LYON, J. On this appeal it is only necessary to consider the question litigated on the trial as to the measure of damages. The court charged the jury, in substance, that the true measure of damages was the difference between the expense of raising the five crops of oats, together with the amount of taxes plaintiff agreed to pay, and the aggregate values of the 300 acres of land, the use of 200 acres thereof, and the fire-wood which plaintiff would have been entitled to take therefrom had he gone into possession of the land; that is to say, on one side of the account the jury were directed to place the value of the land, the value of its use, except the 100 acres, and the value of such fire-wood, and on the other side of the account they were directed to place the probable cost of raising and delivering the oats, and the amount of taxes the plaintiff would have to pay

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under the contract; and they were instructed that if such values of the land, the use thereof, and the fire-wood, exceeded the cost of raising and delivering the oats and the amount of such taxes, the difference was the measure of plaintiff's damages, if he was otherwise entitled to recover.

The plaintiff is entitled to recover, if at all, the value of his bargain. The true measure of such value is the value of the land the defendant contracted to sell to him, estimated at the time the contract was broken, less what the plaintiff agreed to pay therefor. This is the general rule in this state in an action by a purchaser to recover damages for the breach of an executory contract to sell either real or personal property, where no part of the consideration has been paid. *Hall v. Delaplaine*, 5 Wis. 206; *Hill v. Chipman*, 59 Wis. 211. There may be exceptions to this rule, but we do not think this case is within any of them. It must be held that the case is governed by the general rule above stated. If the purchase price equals or exceeds the value of the thing purchased, the purchaser can only recover nominal damages.

The court authorized the jury to assess damages on the basis not only of the value of the land, but the value of the use of 200 acres thereof, and the plaintiff's right to take fire-wood therefrom, we suppose, for the period of five years. This was error. The value of the use of the land, which includes the right to take fire-wood therefrom, is an element which enters into any correct estimate of the value of the land itself, and enhances such value. So when the value of the land is ascertained, it includes the value of the use of the land for all purposes. Adding any sum thereto for the use of the land necessarily increases the plaintiff's damages beyond the limits of the rule. For this error there must be a new trial.

On the same principle the taxes should not be included with the cost of raising the oats, to reduce damages.

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We think the court was correct in holding that the contract price for the land was the necessary expenses of raising the five crops of oats and delivering the same to the defendant pursuant to the contract. The contract names no price for the oats, and does not call for the delivery of any specified quantity or quality. The defendant took the whole risk of price, quantity, and quality, the plaintiff only binding himself to raise and deliver the crops. We think the plaintiff would not have been the owner of the oats before delivery, had the contract been executed, but that the title thereto would always have been in the defendant, who could have held the same against the plaintiff, his vendee, or creditors. If this view is correct, it seems quite clear that plaintiff did not agree to pay for the land in oats, but in labor and services to be employed in the raising of the oats for defendant on land to which the defendant retained the legal title as security for the performance of the contract. We are satisfied that such is the substance and legal effect of the contract, although it is conceded that language is employed therein upon which a plausible argument to the contrary may be framed.

By the Court.—The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

WIETING, Respondent, vs. THE TOWN OF MILLSTON, Appellant.

September 25 — October 14, 1890.

(1) Defective highway: Notice of injury, how given. (2) Sufficiency of description of place and defect. (3) Contributory negligence: Instructions to jury. (4) Second injury as consequence of first. (5) New trial.

1. The giving of the notice of an injury caused by a defective highway in a town, required by sec. 1339, R. S., is sufficiently proved by showing that it was received by the proper officer within the statutory time and filed by him with the town clerk.

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2. A notice stating that J. W. "was injured by being thrown from a wagon on the main highway on section 2, town 20 north, of range 2 west, at a point where said road turns and runs due north, and where said road goes over a hill or bluff; that said injury was caused by a hole being washed in the road, so that in descending the hill, going south, the wagon plunged off from a stone table into said washout," — is *held* sufficiently to describe the place where the accident happened and the defect in the highway which caused it.
3. The refusal to give special instructions on the subject of contributory negligence is *held* not to have been error where such instructions were in the nature of an argument based upon some of the evidence, and the general charge contained a full and fair statement of the law.
4. In an action against a town for the breaking of a leg caused by a defective highway, it appeared that the plaintiff, after having so far recovered as to be about on crutches, had his leg broken a second time by the overturning of a buggy in which he was riding. *Held*, that if the leg would not have been so broken but for its weakened and impaired condition due to the previous breaking, and if the plaintiff was not chargeable with any negligence in respect thereto, he could recover for such second breaking as one of the natural consequences of the first.
5. An order denying a motion for a new trial on the ground of newly discovered evidence will not be reversed where such evidence is merely cumulative and might, with proper diligence, have been produced on the trial.

APPEAL from the Circuit Court for *Jackson* County.

The opinion states the case.

For the appellant there was a brief signed by *Bleekman, Tourtelotte & Bloomingdale*, attorneys, and *C. C. Pope*, of counsel, and the cause was argued orally by *A. E. Bleekman* and *F. A. Bloomingdale*. They contended, *inter alia*, that it was error to refuse the first, second, fourth, and fifth special instructions, asked by the defendant, on the subject of contributory negligence.[1]

[1] These instructions were as follows:

"*First.* If you believe the testimony of the plaintiff and his witnesses as to the nature and character of the insufficiency and want of repair of the highway in question at the time of the injury of the plaintiff on the 28th day of September, 1888, and if you further believe that it was

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For the respondent there was brief by *James O'Neill* and *George E. Waldo*, and oral argument by *Mr. O'Neill.*

TAYLOR, J. This action was brought to recover damages for an injury received upon a highway in the defendant town, the plaintiff alleging that his injury was caused by a defect in such highway. The plaintiff recovered judgment in the trial court, and the defendant town appeals to this court. The errors alleged are (1) that the plaintiff failed to prove that he had given notice of his injury to the supervisors of the town, as required by sec. 1339, R. S.; (2) because the appellant alleges that, upon all the evidence in the case, it was conclusively shown that the plaintiff was guilty of negligence which contributed to his injury; (3) for refusing instructions asked by the defendant, and for erroneously

not consistent with reasonable care upon the part of the plaintiff to drive over the precipice or insufficiency in said road with a team of four horses, one span of which was a runaway span, hitched to a wagon containing a cord of oak wood, the plaintiff sitting upon said wood, with his feet hanging down in front of the load, then and in that case you must find for the defendant.

"*Second.* If you believe, from all the testimony in this case, that the plaintiff was chargeable with a slight want of ordinary care in his conduct at the time of the injury complained of, then and in that case you must find for the defendant, even though you believe, from the testimony, said defendant was guilty of gross negligence, no matter how gross, upon its part, in not repairing the highway where the accident occurred; unless you also believe, from the testimony, that the negligence of the defendant was so gross that you infer it was wilful or malicious."

"*Fourth.* If the jury believe from the evidence that at the time the accident happened the plaintiff was driving a team of four horses, hitched to a wagon loaded with cord-wood; that the two wheel horses were a runaway team; that one of the front stakes in the rack that held the cord-wood on the wagon was a weak and insufficient stake for the purposes for which it was used; that the plaintiff was seated on the top of the load of cord-wood, with his legs and feet hanging down in front of the load; that while driving said team, with said stake in said rack, seated in said position, he drove off a stone table into a hole in the de-

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instructing the jury; and (4) the refusal to grant a new trial on the ground of newly discovered evidence.

Two objections are made to the notice—*first*, that it was not properly served on one of the supervisors of the town, as required by the statute; and, *second*, that the notice does not describe the place where the accident happened with sufficient particularity. The following is a copy of the notice given:

"*John Wieting against the Town of Millston.* To the chairman of the town of *Millston:* You will please take notice that on the 28th day of September, 1888, *John Wieting* was injured by being thrown from a wagon on the main highway on section 2, town 20 north, of range 2 west, at a point near where said road turns and runs due north, and where said road goes over a hill or bluff; that said injury was caused by a hole being washed in the road, so that in descending the hill, going south, the wagon plunged off from

fendant's road, eighteen to twenty inches deep, extending across the traveled track of the road, which hole he had knowledge of from his own observation,—then I charge the jury, as a matter of law, that the plaintiff would be guilty of contributory negligence and cannot recover, and the jury will find for the defendant.

"*Fifth.* If the jury believe from the evidence that the plaintiff, by his own negligence, directly contributed in any degree to the injury sued for, they will find for the defendant; as, if the jury believe from the evidence that the plaintiff was driving a team of four horses, hitched to a wagon loaded with cord-wood, down the hill in question; that the two wheel horses were a runaway team; that one of the front stakes in the rack that held the cord-wood on the wagon was a weak and insufficient stake for the purpose for which it was used; that plaintiff was seated on the top of the load, with his legs and feet hanging down in front of the load; that the plaintiff, while so driving, drove off a stone table in the road into a hole next to the stone table, eighteen to twenty inches deep, extending across the traveled track of the road, which hole the plaintiff had knowledge of from his own observation; and, if the jury believe from such evidence that the plaintiff in so doing directly contributed in any degree to the injury sued for,—then the jury will find for the defendant."—REP.

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a stone table into said washout; and that satisfaction is claimed from said town of *Millston*. Dated November 17, 1888."

The evidence shows that this notice was delivered by the plaintiff's attorney to one Bauml to be served on Mills, the chairman of the town; that Bauml left this notice with Frost to hand to Mills. The evidence further shows that Mills received the notice within ninety days after the accident happened, and that he filed the same in the office of the clerk of the board within said time. This, we think, is sufficient. The statute simply requires that a notice in writing, signed by the party, his agent or attorney, shall be given to one of the supervisors of the town within the ninety days. The evidence shows that the attorney of the plaintiff made out the notice, signed the same, and that it was given to Frost with instructions to hand it to Mills, the chairman of the town; and afterwards, and within the ninety days, it came to the possession of Mills, and he filed the same with the town clerk. The object of the statute is accomplished; the proper officer of the town gets the notice required, within the statutory time, and he recognizes the notice as coming to him in his official capacity, by filing it with the clerk of the town. The manner of giving the notice is not prescribed by the statute. We think the notice was properly given. See *Goldsworthy v. Linden*, 75 Wis. 24; Wade, Notice, §§ 829, 1337, 1342.

We are also of the opinion that the notice sufficiently described the place where the accident happened as well as the defect in the highway which caused the accident. It describes the place as being "on the main highway on section 2, town 20 north, of range 2 west, at a point near where said road turns and runs due north, and where said road goes over a hill or bluff." It is said that describing the road as on section 2, etc., is not sufficient. It is claimed that the section 2 mentioned in the notice means section 2 in said

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town of *Millston*. The evidence shows there was such a section 2 in said town, and that there was a main highway on said section 2 in said town, and that said highway runs over a hill or bluff in its course through said section 2, and that, at a point near where said highway turns north, the accident happened. If the accident happened where the testimony of the plaintiff claims it did, there can be no doubt as to the sufficiency of the description of the place in the notice. It is also urged that the notice does not sufficiently describe "the insufficiency or want of repair which occasioned the accident." The description of the insufficiency in the highway is the same as that which the plaintiff's evidence tended strongly to prove on the trial. It is clear the town authorities were not in any way misled by any insufficient description in the notice of the cause of the accident. We think there can be no question but that the learned trial judge was right in holding the notice sufficient in all respects. *Fopper v. Wheatland*, 59 Wis. 623, and cases cited in the opinion in that case.

It is urged by the learned counsel for the appellant that the court should have nonsuited the plaintiff, or have directed a verdict for the defendant, for the reason, as they claim, that the evidence clearly establishes contributory negligence on the part of the plaintiff. Without citing the evidence given on the trial, we are very clear that the evidence does not, as a question of law, show contributory negligence on the part of the plaintiff. Probably there was evidence in the case which, if believed by the jury, would have justified them in finding that the plaintiff's negligence contributed to the accident; but, upon the whole evidence, it was clearly a question of fact for the jury, and not of law for the court.

The learned counsel for the appellant also assign as error the refusal of the court to give several special instructions requested by them upon the subject of contributory negli-

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gence on the part of the plaintiff. We have read the instructions given to the jury upon that question, and we are satisfied that the learned circuit judge submitted the question of the contributory negligence of the plaintiff with a full and fair statement of the law upon that subject, and that the learned judge did not err in refusing to give the special instructions asked. These instructions are more in the nature of an argument based upon some of the evidence given on the trial, and from which it is claimed contributory negligence was established, than of a legitimate statement of the law on the subject of such negligence. We think the case was fairly submitted by the learned judge, and that the defendant was not prejudiced by the refusal of the court to give the special instructions requested.

After verdict, a motion was made for a new trial, upon the minutes of the court, for the reasons urged in this court for a reversal of the judgment. This motion was overruled by the court, and thereafter the defendant moved for a new trial upon the ground of newly discovered evidence. This motion was also overruled, and defendant excepted, and alleges such refusal of the court to grant a new trial as error for which the judgment should be reversed. It appeared on the trial that, after the plaintiff had partially recovered from the injuries received by him at the time of the accident, he received a further injury by being thrown from a buggy in which he was riding in the night-time with one of his neighbors; and a question arose on the trial whether the plaintiff was entitled to enhanced damages by reason of the second injury. Upon that question, the learned circuit judge instructed the jury at considerable length, and, as we think after reading the instructions carefully, in strict accordance with the law. As this question is a matter of importance in this case, and perhaps of interest to the public, we insert the instructions at length given by

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the learned trial judge upon this point in the case. He said:

"The plaintiff's attorney asks a special instruction with regard to the second breaking of his leg. The evidence shows that his leg was broken a second time after it so knit together that the man went around on crutches, and was at Neillsville. Now, I have already instructed you that he is entitled to recover for his loss or damages which were occasioned by this accident upon that highway. Now, this accident upon the highway broke his leg. The leg had knit together, but was not entirely well at the time of the second accident. Now, the law does not require that a man who has received such an injury shall lie upon his bed until his injuries are perfectly restored. He has a right to get upon his crutches, and to be out doors, and to ride in a wagon, as soon as it is reasonably safe and prudent for him to do so; and if, by doing so, another accident happens to him, which would not have happened except for the first accident, the first accident would be the cause of the damage which he receives. Now, applying it to this case, this man was upon crutches. He was able to be about the street some, and was visiting at Neillsville with a friend of his, and in riding home the buggy was overturned and his limb broken. Now, the evidence, as it stands before you, perhaps does not show very clearly whether there was any new cause there which would have broken a sound limb, or whether the fact that it was broken by this overturning was due to the fact that the limb was weakened and impaired by the previous accident. So I think that if it should be true that his being at the place that he was in this buggy was not negligence, if it was a thing he might do with reasonable safety, and if there was no negligence on his part or the part of the driver of the team with whom he was riding, which caused the oversetting of the wagon, and if

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there was no cause at the time of the oversetting which would have broken his leg, except from this weakened and impaired condition from the previous accident, then I think it would be, in contemplation of law, one of the consequences of the previous accident which broke it the second time; but this would not be true at all if it was negligence for him to be where he was riding in his wagon, or if either he or the man who drove his team was negligent, and their negligence caused this oversetting of the wagon and the breaking of the leg, under circumstances where it would not have broken but for the previous injury. So you will say what you think the truth is in regard to that. If, in that fair sense that I have tried to explain to you, you think the second break was really a natural consequence of the first injury in the impaired condition of the leg, and without negligence on the part of the plaintiff, then he would be entitled to recover for the pain and suffering it caused him, and for the expense of being cured and nursing through the prolongation of his injury. That, I think, is what is right, and what is the law with reference to that question."

These instructions, we think, give the law upon this subject correctly. See *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 359; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475.

It is urged by the learned counsel that the town where the plaintiff was thrown from the buggy might have been liable for that injury by reason of some defect in the highway at that place, but there is no evidence in the case tending to prove that there was a defect in such highway; and, in the affidavits made to support the motion for a new trial for newly discovered evidence, there is nothing tending to show any defect in such highway.

As has been often said by this court, the granting or refusing of a motion for a new trial upon the ground of

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newly discovered evidence is generally a matter in the discretion of the trial judge, and his decision of the motion will not be reversed, except in extreme cases. When the new evidence is merely cumulative, this court will not reverse the order of the court denying the motion. In the case at bar, all the evidence claimed to be newly discovered is merely cumulative and, with proper diligence on the part of the defendant, might have been produced on the trial of the action. We must hold that it was not error to refuse to grant a new trial in this case.

By the Court.— The judgment of the circuit court is affirmed.

JOINT FREE HIGH SCHOOL DISTRICT, etc., Appellant, vs. THE TOWN OF GREEN GROVE, Respondent.

September 25 — October 14, 1890.

Joint school district: Failure of town to raise its share of expenses: Remedy.

To enforce the obligation of a town to raise by taxation its share of the amount required for the support of a joint free high school, the remedy is not by action to recover such share as a claim against the town, but by *mandamus* to compel the levy and collection of the tax.

APPEAL from the Circuit Court for *Clark* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The complaint alleges, in effect, that prior to March, 1885, the towns of Hull and Colby were duly organized towns adjoining each other, the former in Marathon county, and the latter immediately west of it in Clark county. That at the annual town meeting in each of said towns, April 7, 1885, in pursuance of due notice previously given by the

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supervisors of said towns, respectively, a resolution was adopted by a majority of the electors of said towns, respectively, of which the following is a copy, to wit: "Resolved, by the undersigned supervisors of the towns of Hull and Colby, that the said towns unite in establishing and maintaining a free high school, and that the question of establishing and maintaining the said free high school aforesaid be submitted to the legal voters of said towns for adoption or rejection at the annual town meeting to be held on April 7, A. D. 1885." That said votes were by ballots, which were thereupon canvassed and the result of the same duly certified to the clerk of each of said towns, April 14, 1885. That, April 27, 1885, at an election duly noticed and held for that purpose by the qualified electors of said towns, officers were duly elected as follows: Clerk, treasurer, and director,—and the same constituted the free high school board of said joint free high school district, and the persons so elected duly qualified as such officers. That the said joint free high school district has ever since kept up its organization as such, and maintained said high school in pursuance of the objects and purposes thereof. That on or about March 30, 1887, the said town of Colby was divided, and out of the territory constituting the westerly portion thereof was created the town of *Green Grove*, and which last-named town became and was fully organized, April 5, 1887, and ever since that time has been and now is a duly organized and incorporated town in said Clark county. That said town of *Green Grove* is legally liable to contribute to and for the support of said high school in the proportion that the value of the taxable property in said town bears to the value of all the taxable property in said joint school district. That the said high school board met and determined that the amounts necessary to be raised in the district for the support of said school for the several years, 1887–88, 1888–89, and 1889–90, were the respective sums, to wit, of $2,000 for the first year, and $1,250 each for the

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second and third years, and thereupon certified said several amounts together with the proportionate share of said amounts to be raised by said town of *Green Grove* for each of said years, to wit, $395.40 for the first year, $240 for the second year, and $236.50 for the third year, and then and there caused the proper certificate of the board, certifying the same, to be delivered to the clerk of that town as provided by law. That such proportionate share was in each of said cases ascertained and determined according to the total valuation of all the taxable property of said town as equalized by the town board of review. That the town clerk of said *Green Grove* had refused and neglected to assess the several sums so certified, or any of said sums, on any tax roll of said town for either of said years, although often requested so to do. That the defendant denies all liability for the support of said joint district school. That a statement of said claim was made and filed with the town clerk of *Green Grove*, March 25, 1890, to be by the said clerk laid before the board of audit of said town at its next annual meeting. That more than ten days had elapsed since said annual town meeting, and no part of said claim or claims had been allowed by the electors of said town meeting, and that no part thereof had been paid. The complaint demanded judgment for the aggregate amount of the three sums so apportioned to the defendant, to wit, the sum of $871.90, with interest and costs.

To that complaint the defendant interposed a general demurrer, which was sustained by the court; and, the plaintiff not desiring to amend the complaint, the judgment dismissing the complaint was entered at the same time the demurrer was sustained. From that judgment the plaintiff appeals.

For the appellant there was a brief by *R. B. Salter* and *Cate, Jones & Sanborn*, and oral argument by *D. Lloyd Jones*.

James O'Neill, for the respondent.

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CASSODAY, J. It is claimed on the part of the defendant that when, in April, 1887, the township of *Green Grove* was created and organized out of the western portion of the territory which had previously constituted the township of Colby, such territory as was thereupon comprised in such new town ceased to be a portion of such joint free high school district, and hence no longer was obliged to contribute to the support of such high school.

The statute provides for the formation of joint common school districts. Sec. 415, R. S. It also provides that every school district organized pursuant to the chapter on common schools shall be a body corporate and possess the usual powers of a corporation for public purposes. Sec. 417, R. S. Those sections both existed long prior to the statute authorizing the establishment of free high schools, which was not enacted until 1875. Sec. 490, S. & B. Ann. Stats. Such sections, therefore, are to be construed as a continuation of such laws, and not as new enactments. Sec. 4985, R. S.; *Thompson v. Milwaukee*, 69 Wis. 494; *State ex rel. Bergenthal v. Bergenthal*, 72 Wis. 319. The statute for the alteration of joint common school districts by boards of two towns was not enacted until 1882. Sec. 419*a*, S. & B. Ann. Stats. The statute relating to free high schools provides that "two or more adjoining *towns* may unite *in establishing and maintaining* any such high school." Sec. 491, Id. The statutes also provide how, and the conditions upon which, aid may be obtained from the state. Secs. 491*a*, 491*b*, 494–496, Id.

In an opinion of the learned state superintendent upon the question here involved, he refers to the fact that, while there is no express provision in the statutes for the discontinuance of a free high school, yet there are three or four indirect ways by which, under the sections of the statute cited, such school may cease to be a free high school in any such sense as to entitle it to participate in the state aid. He then maintains that such joint free high school is not,

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under the statutes, a body corporate, but can only be maintained, if at all, through the agencies of the towns composing the same. He further maintains that upon the creation of the defendant town it ceased to be any part of said joint free high school district. It is certain that the statute does not expressly declare such joint free high school district to be a body corporate. If it be so at all, it is merely by implication or construction. The statute provides that the officers of each such district shall be a director, treasurer, and clerk, to be elected at the annual town meeting or charter election, but is silent as to the manner of proceeding in case of such election, or whether the election is to be by one or more towns or the territory comprising such joint free high school district. Sec. 492, S. & B. Ann. Stats. The statute merely provides that the high school board and the officers thereof shall conduct the affairs of such high school district on the same general plan provided for school districts, and have and possess, with respect to such high school district, all the powers, including such as may be conferred by vote of a district meeting, and be charged with all the duties conferred and imposed on the district officers and district board of a school district, applicable to such high school district. Sec. 493, S. & B. Ann. Stats. We agree with the state superintendent that our free high school system "is crude, deficient, and complicated, and greatly needs revision;" and we have referred to the several provisions of the statutes for the very purpose of calling the attention of the coming legislature to the matter. The view we have taken of this case makes it unnecessary that we should here determine whether the plaintiff is a body corporate with the right to sue or not; nor whether in case it be such body corporate the town of *Green Grove* is included in it. What is here said, therefore, will be upon the assumption that the plaintiff is a body corporate, and that the defendant town constitutes a part of it.

This is an action at law, pure and simple. The complaint

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demands a money judgment and nothing more. It is not based upon any contract, express or implied, nor upon any tort. The whole theory of the complaint is that certain officers, and particularly the town clerk of the defendant town, had neglected and refused to perform their official duty in the matter of levying and collecting the defendant's proportionate share of the taxes for the maintenance and support of the high school in question for the several years named. It is purely a question of law, upon the facts stated, whether such officer or officers were charged with such official duty, and hence required to perform the same. If they were not, then the plaintiff is wholly without remedy. If they were, then *mandamus* is the only effectual remedy to enforce the performance of such official duty. *School Dist. No. 2 v. School Dist. No. 1*, 3 Wis. 333; *State ex rel. Ordway v. Smith*, 11 Wis. 65; *State ex rel. Van Vliet v. Wilson*, 17 Wis. 687; *Labette Co. Comm'rs v. Moulton*, 112 U. S. 217; *Harshman v. Knox Co.* 122 U. S. 306; *Comm'rs v. Loague*, 129 U. S. 493. In other words, the facts alleged do not present a case calling for damages, but one, if at all, calling for the enforcement of an official duty. The learned counsel for the plaintiff contends that, if the plaintiff has the right to the extraordinary remedy by *mandamus*, then it necessarily has the milder remedy by this action at law; but, as indicated, the facts alleged are not such as authorize a money judgment. On the contrary, and upon the assumption indicated, they call for a judgment compelling the officers of the town to perform their official duty. Anything short of that would be no remedy.

By the Court.— The judgment of the circuit court is affirmed.

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La Flex, Respondent, vs. Burss, Appellant.

September 25 — October 14, 1890.

(1) Partnership, what constitutes. (2) Demand not due: Pleading: Instructions.

1. An agreement between the owner of standing timber and another, by which the latter is to cut the timber into cord-wood, and the owner is to market it, and the proceeds are to be divided equally between them, does not make them partners.
2. In an action to recover a balance alleged to be due upon a contract for work done, the answer was merely a general denial. The trial court charged the jury, in effect, that the plaintiff might recover all that had become due up to the time of the verdict, for the work done before the commencement of the action. The defendant did not ask for any instruction as to any part of the demand which he claimed was not due when the action was commenced. *Held*, that the judgment for the plaintiff would not be reversed.

APPEAL from the Circuit Court for *Clark* County.

The action was commenced in justice's court, May 9, 1888, to recover the sum of $56.93 alleged to be due to the plaintiff for work and labor in chopping wood for the defendant in the winter of 1887–88, and the sum of $2.80, the alleged price of chickens sold and delivered by the plaintiff to the defendant. The complaint alleged that said sums became due prior to the commencement of the action. The answer was a general denial.

The plaintiff recovered judgment in the justice's court, and the defendant appealed to the circuit court. The cause came on for trial in the latter court on December 5, 1889. The defendant objected to any testimony being received on the ground that the action was brought to recover a balance of an unsettled partnership transaction, for which no action at law could be maintained. The objection was overruled. After the plaintiff had rested, the defendant moved, upon the same ground, that the court withdraw from the case all the plaintiff's claims except the item of the chickens.

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The motion was denied. The evidence given on the trial will sufficiently appear from the opinion. The court instructed the jury to "ascertain how much is due the plaintiff for all the chopping he did, and then ascertain how much he has received for it, and if there is a balance in his favor give him that balance." The jury returned a verdict in favor of the plaintiff for $65.92.

The bill of exceptions states that "upon the coming in of said verdict the defendant's counsel stated to the court that he was at a loss to know why the court had charged the jury as it did, and had not submitted to them to find how much was due the plaintiff, if anything, at the commencement of the action. Whereupon the court stated that the court had charged in the manner it did for the reason that the defendant had not pleaded in abatement that the debt or demand was not all yet due, and that the plaintiff was entitled to receive all that had become due upon the same contract, for the same breach, up to the time of verdict. To which the defendant's counsel urged that the case had been tried and argued to the jury without any objection having been made that the answer did not plead in abatement that the debt was not yet all due."

A motion for a new trial was denied, and from the judgment entered on the verdict the defendant appealed.

James O'Neill, for the appellant, contended, *inter alia*, that it was error to permit the plaintiff to state that there was due him, at the commencement of the action, between $50 and $60. This was a mere conclusion, not a statement of fact. 1 Thomp. Trials, secs. 317, 381; *White v. Stoner*, 18 Mo. App. 540; *Smith v. Young*, 26 id. 575, 578; *Kauffman v. Babcock*, 67 Tex. 241; *Morehouse v. Mathews*, 2 N. Y. 514; *Lincoln v. S. & S. R. Co.* 23 Wend. 425; *Norman v. Wells*, 17 id. 136; *Young v. Cureton*, 87 Ala. 727; *Bain v. Cushman*, 60 Vt. 343. The action should have been dismissed because brought to recover what was in fact the

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balance of an unsettled partnership account. Story, Partn. sec. 2; *Gilbank v. Stephenson*, 31 Wis. 592; *Fail v. McRee*, 36 Ala. 61; *Allen v. Davis*, 13 Ark. 28; *Musier v. Trumpbour*, 5 Wend. 274; *Tolford v. Tolford*, 44 Wis. 547. The charge to the jury was erroneous. There was no contract by defendant to pay plaintiff anything until the money was received by him. After it was received the plaintiff, upon demand, could maintain an action for money had and received but not for work and labor. *Hitchings v. Ellis*, 12 Gray, 449; *Fail v. McRee*, 13 Ark. 28. It was not necessary to plead that the debt was not due. If there was a subsisting indebtedness to become due, it might be necessary to plead in abatement. But there was no indebtedness and no cause of action whatever as to the wood not disposed of. It being alleged in the complaint that the sum named "became due prior to the commencement of this action," that allegation is properly covered by the general denial. Pomeroy, Remedies, sec. 672; *Quin v. Lloyd*, 41 N. Y. 349; *Millett v. Hayford*, 1 Wis. 411. The case having been tried on the issue whether anything was due at the commencement of the action, without objection, the court should have considered the answer as amended. *Bowers v. Thomas*, 62 Wis. 480.

For the respondent the cause was submitted on the brief of *R. B. Salter*.

COLE, C. J. We think there was no error in the trial court holding that the arrangement between the parties to this suit about cutting and marketing the cord-wood did not make them partners in that business. It seems that the defendant owned land upon which there was standing timber. He and the plaintiff entered into this arrangement. The latter was to cut the timber into cord-wood, and the former was to haul the cord-wood into market at coal kilns, and the money which was received from the cord-wood was

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to be divided equally between them. The arrangement was simply a mode of measuring the compensation of the plaintiff for cutting the wood. In other words, he was to receive one half of the money which the wood sold for, as a reward for his labor in cutting it. This did not constitute a partnership as between the parties, and none was intended. The plaintiff did not own, or have any title in, the cord-wood after it was cut. He could not control it or sell it; but, when it was sold, he was to receive one half of the proceeds as compensation for his services in cutting it. There was really no community of interests or sharing of profits or losses in the adventure. Whether one half of the proceeds would pay the plaintiff good wages for the cutting of the wood, or would pay the defendant for his timber and expenses of hauling it to the coal kilns, was a matter in which the other party had no concern. We think the evidence shows that the agreement was that the cord-wood was to be hauled away by the defendant, and marketed within a reasonable time after it was cut, and the proceeds divided between the parties. But there was to be no sharing in profits and losses in the business, no community of interests in the profits as such, which is the principal criterion of a partnership; but at most it was a mere arrangement by which the plaintiff was to obtain compensation for his labor and services or his wages for cutting the cord-wood. *Ford v. Smith*, 27 Wis. 261; *Nicholaus v. Thielges*, 50 Wis. 492, and cases of that kind, go upon this principle: That where a man stipulates that, as a reward for his labor, he shall receive a given sum, even in proportion to the quantum of the profits, this will not necessarily make him a partner in the business.

In *Gilbank v. Stephenson*, 31 Wis. 592, there was an understanding between the parties that each was to furnish a horse for breaking lands of other persons; that the plaintiff was to do all the work, and the defendant pay all the ex-

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penses, and the money earned was to be divided equally; it was held to constitute a partnership, because the business was to be done at the joint expense of the respective parties. But there was nothing of the kind in this case; hence there was no ground for holding that the action was brought to recover the balance of an unsettled partnership account. It was brought to recover the stipulated wages for cutting a quantity of cord-wood. This is very plain.

It is said the court erred in allowing the plaintiff to state how much was due him. He testified as to how many cords he had cut under the arrangement, and what he was to be paid, and the quantity hauled away. He had had dealings with the defendant, had received supplies, and he stated generally the balance due him on account. The circuit court directed the jury to find from the evidence how much was due the plaintiff for all the wood he had chopped, and to ascertain how much he had received for his work, and, if there was a balance in his favor, to give him the amount of that balance. The parties were sworn in the case, and testified fully about the original agreement and as to the state of the accounts between them. The plaintiff was an illiterate man, and the accounts between the parties, so far as there were any, were mainly kept by the defendant. It is said there was no evidence that anything was due the plaintiff when the suit was commenced. We do not so understand the testimony. The evidence is entirely clear and satisfactory that the plaintiff had cut more wood than he had been paid for. True, according to the contract, the defendant was to pay the plaintiff his portion of the money as he marketed the wood, and it is probably a fact that he had not hauled and sold all the wood the plaintiff had chopped when the action was commenced, but the evidence shows that the plaintiff had frequently requested him to haul the wood to market, as he wanted the money coming to him, but the defendant neglected to per-

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form his duty in that respect. He claimed he was to have the next summer and next winter, if needed, to haul it away. We would be inclined to doubt the correctness of that statement, as it is improbable when the circumstances of the parties are considered. The plaintiff was a poor man, and needed his wages to pay his debts and support himself and family. And, though no specific instruction was asked and given upon the point, yet, under the charge, the jury must have found that the plaintiff had not been fully paid for his work when the suit was commenced. Whether the jury were satisfied from the proof that the defendant delayed hauling the cord-wood an unreasonable time after he should have hauled it, or that he had determined not to haul it until the next winter, and intended to raise the money and pay the plaintiff for what was due him for his work, we cannot tell. There is evidence in the case to warrant the latter conclusion. But certainly the issue as to whether the action was prematurely commenced as to any portion of the plaintiff's claim, was not raised by the pleadings. Such an issue would of course be only in abatement of the action as to such portion, and it seems to us the objections should have been taken in some way on the trial before the cause was submitted to the jury. It is said in the printed case that the circuit judge, after verdict, stated that he charged in the manner he did because the defendant had not pleaded in abatement that the debt or demand was not yet all due. The learned circuit judge held that the plaintiff was entitled to recover, under the circumstances, all that had become due on the contract, for the same breach, up to the rendition of the verdict. If the defendant was not satisfied with the general charge as given, he should have asked an instruction directing the attention of the jury to that portion of the plaintiff's demand which he claimed was not due. The jury found from all the evidence that the amount claimed by the plaintiff was

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due him, and we are unable to say that this finding is unsupported by the proof in the case. The judgment seems to be right on the whole record, and we affirm it, as it is in accordance with substantial justice and the real merits of the case.

By the Court.— The judgment of the circuit court is affirmed.

ROBINSON, Appellant, vs. THE TOWN OF WAUPACA, Respondent.

September 25 — October 14, 1890.

Defective highway: Personal injuries: Evidence: Immaterial error: Inadequacy of damages.

1. In an action against a town for personal injuries caused by a defective highway, an error in allowing witnesses to testify that in their opinion the dog-cart in which the plaintiff was riding was unsafe, is *held* immaterial, the jury having found for the plaintiff.
2. A verdict awarding damages for personal injuries will not be set aside on the ground that such damages are inadequate, unless they are so disproportionate to the injuries that the jury must have been influenced by a perverted judgment. A verdict for $167 in this case is not disturbed.

APPEAL from the Circuit Court for *Waupaca* County.

This is an action to recover damages for personal injuries to the plaintiff, alleged to have been caused by a defective highway in the defendant town.

On June 6, 1886, the plaintiff was riding with her husband on such highway in a vehicle on two wheels, called a "dog-cart," drawn by one horse then being driven by her husband. When the horse was walking briskly, one wheel of the cart struck a stone a few inches high, firmly fixed in the ground and extending from the side of the traveled track to within three or four inches of one of the wagon

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ruts in the track; and by reason of the concussion plaintiff was thrown from the cart and received the injuries complained of.

On the trial of the cause, the court allowed witnesses for the defendant to testify, against objection by the plaintiff, that in their opinion carts like the one in which plaintiff was riding at the time she was injured are unsafe for the use of two persons riding over ordinary country roads.

The trial resulted in a verdict for the plaintiff, assessing her damages at $167. The plaintiff moved for a new trial, mainly on the ground that the damages so assessed are inadequate to compensate her for the injury she proved she sustained. The motion was denied, and judgment was thereupon entered for the plaintiff, pursuant to the verdict, from which judgment she appeals to this court.

For the appellant there was a brief by *Cate, Jones & Sanborn*, and oral argument by *D. Lloyd Jones*.

Myron Reed, for the respondent.

LYON, J. Counsel for plaintiff claims a reversal of the judgment on two grounds. These are that the court erred in allowing witnesses for the town to testify that in their opinion the cart in which the plaintiff was riding was unsafe for the use of two persons riding together in it on ordinary country roads, and that the damages awarded the plaintiff are grossly inadequate to compensate her for the injuries she received.

1. Undoubtedly it was error to admit testimony of the opinions of witnesses that the cart was thus unsafe. That was a question for the jury, upon all the facts in the case. This court so held in *Kelley v. Fond du Lac*, 31 Wis. 179; *Oleson v. Tolford*, 37 Wis. 327; *Griffin v. Willow*, 43 Wis. 509; and other cases. But the jury found for the plaintiff, and in order to do so they must necessarily have found

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that the cart was a proper vehicle to be used by the plaintiff and her husband at the place where she was injured. Hence the testimony thus erroneously admitted did not prejudice or harm the plaintiff, and the error in admitting it is not sufficient ground for reversing the judgment.

2. Were the damages which the jury awarded the plaintiff so inadequate to compensate her for the injuries she sustained that it was the duty of the circuit court to set aside the verdict for that reason? That the court may, and in a proper case should, set aside a verdict for inadequacy of damages and award a new trial, is not questioned. This court so held in *Emmons v. Sheldon*, 26 Wis. 648, and *Whitney v. Milwaukee*, 65 Wis. 409. But, to justify the interference of the court with the verdict, it must appear from the testimony that the damages awarded are so grossly disproportionate to the injury that in awarding them the jury must have been influenced by a perverted judgment. The court was able thus to characterize the verdict in *Emmons v. Sheldon*, for the damages there awarded were but $5 (which charged the plaintiff with the costs of the action), although it was proved that the plaintiff suffered a most serious bodily injury. There seems to have been no controversy as to the extent of such injury. And so in *Whitney v. Milwaukee*, the undisputed evidence proved that the plaintiff was so seriously injured that the damages awarded by the jury therefor were grossly inadequate compensation, and so small that the plaintiff was chargeable with the costs, which exceeded the damages awarded. This court was able to say that the verdict was perverse, and that (quoting from the opinion delivered by Mr. Justice ORTON) "such a verdict is trifling with a case in court and public justice, and unworthy of twelve good and lawful men, and is justly calculated to cast odium on the jury system and jury trials."

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We adhere to the rule established in those cases. Hence the question is, Does the testimony bring this case within the rule? In the consideration of this question we must assume that the jury found every fact going to mitigate or reduce the damages which they could properly find from the proofs. The testimony tends to show that the plaintiff was to some extent an invalid before she was injured, and that the pain and disability she has suffered since the injury should, in part at least, be attributed to previous ill health. Then the circumstances of the injury and her condition presently thereafter tend to show that the injury was not so severe as claimed. There is considerable testimony of the above character, and we think it sufficient materially to mitigate her claim for damages. Under the testimony, therefore, there is a wide margin for the jury in assessing damages. Probably a verdict for a much larger sum could have been held not excessive. Perhaps, if the plaintiff's testimony as to the extent of her injuries stood alone, it ought to be held that the damages are inadequate. But in view of all the testimony, and of the fact that the verdict has successfully passed the scrutiny of the learned circuit judge, we do not feel warranted in saying that it is a perverse verdict. Hence, although we might have been better satisfied had a somewhat greater sum been awarded, we are not at liberty to disturb the verdict.

By the Court.— The judgment of the circuit court is affirmed.

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HEWITT, Respondent, vs. THE JOHN WEEK LUMBER COMPANY, Appellant.

September 26 — October 14, 1890.

(1) Interest: Unliquidated counterclaim. (2, 3) Custom: Logs and lumber: Evidence: Contract: Damages.

1. Though upon a liquidated claim interest is recovered from the time when the cause of action accrued, upon an unliquidated counterclaim thereto, accruing at the same time, interest is recoverable only from the date of service of the answer.
2. A custom of the mill-owners on the Wisconsin river to retain the slabs from logs sawed by them is a general custom, which may be proved without having been pleaded.
3. In an action to recover damages for a failure to furnish the agreed quantity of logs under a contract for sawing, the mill-owner may recover (in addition to the difference between the contract price for the sawing and the actual cost of doing the work) the value of the slabs to which, by a general custom, he would have been entitled.

APPEAL from the Circuit Court for *Portage* County.

Action by *Henry Hewitt, Jr.*, as surviving partner of the firm of Daniels & Hewitt, to recover a balance of the purchase price of logs sold and delivered to the defendant. The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action is brought here by the appellant without settling any bill of exceptions, and the record returned contains only the pleadings, the special verdict of the jury, and the judgment of the court upon such verdict.

The case is brought here by the defendant, upon two questions: *First.* It is claimed that the defendant should have been allowed interest upon the amount of damages recovered by it from the time of the breach of the contract by the plaintiff, whereas the court only allowed interest from the day of the filing of the counterclaim. *Second.* It is claimed that the court erred in not allowing, as a part of

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its damages, the value of the slabs from the logs of the plaintiff which the plaintiff should have furnished under his contract, and which the defendant had agreed to saw for him.

The rights of the appellant to be adjudicated upon this appeal arise upon the counterclaim of the defendant, set up in its answer, in which it claims that the plaintiff had failed on his part to perform the contract set up in such counterclaim. The following is a copy of the contract as set up in the appellant's counterclaim:

"Memoranda of agreement made and concluded this 10th day of September, A. D. 1886, by and between the *John Week Lumber Company*, of the city of Stevens Point, Wisconsin, party of the first part, and Hewitt & Daniels, of Hutchinson, Wis., parties of the second part:

"Witnesseth, that the said party of the first part, for the consideration hereinafter mentioned, agree to manufacture into lumber or shingles, in a good and workmanlike manner, certain lot of pine saw-logs now in the Stevens Point Boom Company's boom and owned by said second parties, consisting of eight hundred thousand feet (800,000), more or less, marked on the end H. D., and on the side H.; also one hundred and fifty thousand feet (150,000), more or less, marked on the end D. D., and on the side X. Said logs are to be manufactured into lumber or shingles as said second party or their agent may direct, and as fast as they are delivered into their mill-boom, and piled in their lumber-yard in such manner as such second parties may direct, and shall be assorted, if so desired, into three grades, as near as may be,—into select and better, common, and culls. Said logs or timber that may be manufactured into shingles shall be assorted and packed into three grades, known as 'star A star,' 'shaded A,' and 'number one,' or 'culls,' in the usual and customary manner, and piled in said first parties' lumber-yard. All lumber and shingles to be covered or roofed

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with second parties' lumber. Said first parties agree to manufacture said logs into lumber on their band and circular saw-mills, each mill to be run to its fullest capacity as near as may be. It is mutually agreed and expressly understood that all the said lumber shall be manufactured into thickness of one and one fourth ($1\frac{1}{4}$), one and one half ($1\frac{1}{2}$), and two inch (2) or thicker, as second parties may direct. Said second parties agree to deliver all of said logs into said first parties' mill-boom during the sawing season of 1886, in lots of two hundred thousand (200,000) feet or more at each delivery.

"Said second parties further agree to pay said first parties for the manufacturing, assorting, piling, and covering of the lumber, in the manner aforesaid, the sum of two dollars and seventy-five cents ($2.75) for each and every thousand feet so manufactured, and for the manufacturing and assorting, packing, piling, and covering of the shingles, in the manner aforesaid, the sum of eighty-five (85) cents per thousand for star A star; sixty-five cents (65) per thousand for shaded A; and forty cents (40) per thousand for number ones, or culls. Payments to be made as follows: One half of the above agreed price at the end of each month, as fast as said lumber and shingles are put in the pile, and the balance on the 15th day of December, 1886. It is mutually agreed that said lumber shall be estimated in the pile by A. G. Hamacker, of Stevens Point, Wis., whose estimates shall be final in determining the number of thousand feet of lumber and the number of thousand of shingles, one half of the expense of such estimate to be paid by each of the parties hereto."

The defendant, in its answer, sets up a counterclaim under this contract, and alleges a breach of the same on the part of the plaintiff by refusal to furnish and deliver 550,000 feet of logs agreed to be furnished by the plaintiff under such contract, and alleges that the actual cost to the defendant

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to manufacture such logs into lumber, as required by the contract, would not exceed seventy-five cents per thousand feet; and then alleges that it has been damaged, by reason of such refusal on the part of the plaintiff to furnish such logs, in the sum of $1,000, with interest thereon from the 15th of December, 1886, and demands judgment for that sum.

Upon this counterclaim the jury found a special verdict as follows: "(11) Did the defendant, in 1886, agree in writing with said Daniels & Hewitt to manufacture into lumber 950,000 feet of saw-logs belonging to said Daniels & Hewitt, and did it manufacture into lumber any part of said logs? Answer. Yes. (12) What amount, if any, is due and unpaid from plaintiff to defendant for manufacturing such logs into lumber and shingles? A. $811.70. (13) Was the lumber so manufactured by defendant sawed and piled in a good and workmanlike manner? A. Yes. (14) If you say 'No' in answer to the last question, then was the plaintiff damaged thereby, and, if so, how much? A. ——. (15) Did the said Daniels & Hewitt fail to deliver any part of said logs contracted to be sawed, as before stated, into the mill-boom of defendant's mill? A. Yes. (16) How many feet of logs did they fail to deliver? A. 525 M. (17) What amount would it have cost the defendant, per thousand feet, to saw and pile the logs not delivered in the manner provided in the aforesaid written agreement, without taking into account the value of the slabs? A. $1.10. (18) What was the value per thousand feet of logs, to defendant, of the slabs obtained by it in the manufacture of logs into lumber in the fall of 1886? A. Forty-one cents. (19) Was there a general custom in the saw-mills on the Wisconsin river, on September 29, 1886, and for many years prior thereto, that the manufacturer kept the slabs made therefrom, unless otherwise specially agreed upon? A. Yes."

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Upon this verdict in favor of the appellant, the circuit court entered the following judgment, after rendering judgment in favor of plaintiff for the amount found due to him, viz.: "(2) That said defendant be credited, and allowed to set off against the above amount, the sum of $811.70, the amount found by said jury to be due from plaintiff to defendant for manufacturing lumber, including interest to the date of trial. (3) That said defendant be credited and allowed to set off against the aforesaid sum credited to the plaintiff the further sum of $924, as damages for the failure to deliver to the defendant 525,000 feet of saw-logs to manufacture, as provided in the written agreement referred to in the defendant's answer, whereby said defendant lost in profits the difference between the contract price for sawing and piling such logs, which was $2.75 per thousand, and the amount which it would have cost defendant to have sawed and piled the same, which was $1.10 per thousand, as found by said jury, said difference being $1.65 per thousand for said 525,000 feet of logs, and amounting to the sum of $866.25, in the aggregate, which amount, with interest thereon from the time the answer was served in said action,— to wit, March 20, 1889,— at the rate of seven per centum, up to the date of trial, would amount to the aforesaid sum of $924, the said amount to be credited as of the date of trial. It is therefore ordered that, after deducting the aforesaid sums from the amount so credited to the plaintiff as aforesaid, the said plaintiff have judgment herein against the defendant for the balance, to wit, for the sum of $635.52 damages, together with the costs of this action to be taxed; and the clerk of said court is hereby authorized and directed to enter judgment accordingly. Dated March 1, 1890. By the court, CHAS. M. WEBB, Judge."

To this judgment the defendant entered the following exceptions: "Defendant excepts to so much of said order as denies defendant interest upon its damages for breach of

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contract, as found by the jury in their answer to the 15th, 16th, 17th, and 18th questions in their special verdict, from the date of the breach of said contract, and not from the date of the service of the answer, for the reason that interest was allowed plaintiff on his damages, and interest should have been allowed to defendant in offset to same. Defendant also excepts to that part of said order fixing the amount of defendant's damages for the breach of contract at $924; and the defendant insists that, by the finding of the jury, it is entitled to recover, in addition to said sum of $924, the sum of forty-one cents per thousand feet of logs for the slabs made therefrom, to wit, the sum of $215.25."

For the appellant there was a brief by *Cate, Jones & Sanborn*, and oral argument by *D. Lloyd Jones.*

For the respondent there was a brief by *Miller & McCormick*, attorneys, and *John Barnes*, of counsel, and oral argument by *Mr. Barnes.* They contended, *inter alia*, that the custom relied upon by appellant, being confined to the mill-owners on one river, is a local custom and should have been pleaded. *Templeman v. Biddle*, 1 Har. (Del.), 522; *Wallace v. Morgan*, 23 Ind. 399; *Governor v. Withers*, 5 Grat. 24, 50 Am. Dec. 95; *Gano v. Palo Pinto Co.* 71 Tex. 99; *Lindley v. First Nat. Bank*, 76 Iowa, 629; *Girard L. Ins. Co. v. Mutual L. Ins. Co.* 13 Phila. 90. A local custom is not binding upon parties to a written contract, unless the contract itself refers to it. *Eager v. Atlas Ins. Co.* 14 Pick. 141. A mere finding that such a custom existed is not sufficient. It was necessary for the jury to find that it was known to respondent and that the parties contracted with reference to it. 2 Pars. Cont. (5th ed.), 541; *Power v. Kane*, 5 Wis. 265; *Lamb v. Klaus*, 30 id. 94; *Scott v. Whitney*, 41 id. 504; *Paine v. Howells*, 90 N. Y. 660; *Higgins v. Moore*, 34 id. 425; *Bradley v. Wheeler*, 44 id. 500; *Herman v. Niagara F. Ins. Co.* 100 id. 411; *Walls v. Bailey*, 49 id. 464.

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TAYLOR, J. The exception taken by the defendant that the court erred in not allowing him interest on his damages from the time fixed for the performance of this contract by the plaintiff, according to the terms of the contract, or, in lieu thereof, applying the amount of his damages to the extinguishment of so much of the plaintiff's claim against the defendant as of the date of his claim, we do not think is well taken. The plaintiff's claim for damages arose out of a contract separate and distinct from the contract upon which the defendant seeks to recover. It is said it is unjust to permit the plaintiff to lay by for years upon his claim, and then be permitted to recover interest upon his damages from the time the same accrued until the judgment, and at the same time refuse to permit the defendant to recover interest on his damages which accrued at the same time plaintiff's accrued; but the difficulty with the defendant's claim is that the nature of his damages were such as were not ascertained and could not be ascertained with certainty until the verdict of the jury in the case, while the plaintiff's damages were ascertainable and susceptible of liquidation without the intervention of a court or jury.

The fact that defendant's claim is ascertained by way of counterclaim in an action against him by the plaintiff cannot change the rule as to allowing interest. A counterclaim is an action by the defendant against the plaintiff, and his rights are to be determined as though he was pursuing the plaintiff in a separate and independent action. It would hardly be claimed that, if this action had been entirely disconnected with the action of the plaintiff against the defendant, the defendant would have been entitled to recover more interest than he recovered by the judgment in this case. It is not a case similar to the case referred to (*McMahon v. N. Y. & E. R. Co.* 20 N. Y. 463), where the court held that the plaintiff ought to recover interest on an unliquidated claim, because the defendant had himself pre-

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vented the plaintiff from liquidating the same by not causing certain measurements to be made which he had agreed to make, and which when made would have liquidated and ascertained the amount of the plaintiff's claim. In this case the defendant could have caused his claim to be liquidated by bringing an action at any time after his cause of action arose; and, under the rule adopted in this case by the trial court, he would then have been entitled to recover interest from the commencement of his action. His delay in bringing his action cannot be charged to the account of the plaintiff. Under the rule laid down by this court in *Marsh v. Fraser*, 37 Wis. 149; *Tucker v. Grover*, 60 Wis. 240; *Yates v. Shepardson*, 39 Wis. 173; *Shipman v. State*, 44 Wis. 458; *Tyson v. Milwaukee*, 50 Wis. 90,—the defendant was allowed all the interest he was entitled to.

The objection made by the defendant that the court erred in not allowing him forty-one cents per thousand as an item and part of his damages arising out of the refusal of the plaintiff to perform the contract on his part, is, we think, well taken. The jury expressly found that it "was a general custom in the saw-mills on the Wisconsin river, on September 29, 1886, and for many years prior thereto, that the manufacturer kept the slabs made therefrom (that is, from the logs manufactured), unless otherwise specially agreed upon;" and they also found the value of such slabs to the defendant under this contract to be the sum of forty-one cents per thousand. These findings must, in the absence of any bill of exceptions in the case, be held to have been supported by the evidence.

It is urged on the part of the plaintiff that, because the counterclaim of the defendant did not set out such custom, he should not have been permitted to prove the same on the trial; and if the court on the trial admitted such proofs, he might, after the verdict was taken, reject the finding, because founded upon evidence improperly admitted. In the

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absence of anything in the record showing the contrary, we think this court must hold that this evidence of custom was properly admitted, or, at all events, admitted without objection on the part of the plaintiff, and so properly submitted to the jury. But, in addition to this, the custom found by the jury is a general custom, within the meaning of the law, and therefore may be proved without alleging it. The custom was, we think, a proper and lawful custom and one which would be likely to be adopted by parties dealing in the furnishing of logs by one party and the manufacture of them by another party, for the reason that the slabs would be of considerable value to the mill-owner, and of little or no value to the man furnishing the logs, if required to remove them from the mill. It certainly is not an unlawful custom.

Now the object of proving a general custom is not to contradict or change the contract made between the parties, but to interpret it to the court and jury as it was understood by the parties at the time it was made; and this evidence of a general custom, when it does not contradict or change the express terms of the written contract, is admitted for the purpose of showing what the real contract between the parties was. The proof of such custom is always admitted without pleading it. *Power v. Kane*, 5 Wis. 265, 268; *Hall v. Storrs*, 7 Wis. 253; *Lamb v. Klaus*, 30 Wis. 96; *Lee v. Merrick*, 8 Wis. 229; *Marshall v. Am. Exp. Co.* 7 Wis. 1; *Keogh v. Daniell*, 12 Wis. 163; *Huebschmann v. McHenry*, 29 Wis. 655; *Hinton v. Locke*, 5 Hill, 437; *Scott v. Whitney*, 41 Wis. 504, 507. And, when it is clearly proven, the parties are supposed to have contracted with reference to such custom, unless such custom changes the express terms of the written contract. See cases cited above. Under the findings of the special verdict, the forty-one cents per thousand, the value of the slabs, was as much a part of the defendant's damages as was the difference be-

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tween the contract price for the sawing and the actual cost of performing the work, and should have been allowed by the court and deducted from the sum found due to the plaintiff.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment upon the special verdict in accordance with this opinion.

WEST, Respondent, vs. WALKER, Administrator, and others, Appellants.

September 26 — October 14, 1890.

(*1*) *Jurisdiction: Real actions: Place of trial.* (*2–4*) *Antenuptial agreement: Modification after marriage: Election by widow to take dower, etc.: Deceit as to value of husband's property: Estoppel.*

1. Where an action for the recovery of real property has been brought in a county other than that in which the property is situated, the court has jurisdiction and the action is properly triable where commenced, unless steps are taken to have the venue changed.
2. In an action to recover dower it appeared that an antenuptial agreement executed by the plaintiff and her deceased husband had been lost or destroyed. The attorney who drew it, a witness thereto, and another attorney who used it in drawing a subsequent agreement testified as to its terms, substantially agreeing that the deceased therein agreed that the plaintiff should have $1,000 from his estate if she survived him, and her support as long as she lived, in lieu of dower and in full of all allowances and all claims against his estate, and that the plaintiff therein agreed to marry him and be a true wife. *Held*, that the terms of the agreement satisfactorily and sufficiently appeared from the evidence, and that it was a valid agreement, binding upon both parties.
3. A subsequent agreement, executed some years after the marriage and shortly before the husband's death, with substantially the same terms, but making slight additional gifts to the plaintiff, is *held* to be merely an amendment and continuation of the antenuptial agreement, it being conclusively shown that it was so understood

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and intended by the deceased, although by its terms it revoked the previous agreement. The plaintiff could not, therefore, waive the benefits of the later agreement, and claim dower and her other rights in the estate under the law.

4. Having lived with her husband for several years before the execution of the later agreement, the plaintiff will be presumed to have known then the value and extent of his property; and by her acceptance of such agreement, making but a slight additional provision for her, she is estopped to claim that when the antenuptial agreement was executed she was deceived as to the amount of his property.

APPEAL from the Circuit Court for *Portage* County.

Action to recover dower, possession of the homestead, and the plaintiff's lawful share of the personal estate of her deceased husband. The facts are stated in the opinion. The post-nuptial agreement therein referred to was as follows:

"This agreement made this 16th day of March, 1886, between Calvin West, party of the first part, and *Elizabeth West*, party of the second part, all of Portage county, Wis.

"*Witnesseth:* That the said parties are man and wife, and that they have agreed what the said party of the second part shall be paid in full satisfaction for all her interest and dower right in all the personal and real property of the said party.

"I, Calvin West, do hereby revoke and make null and void all previous contracts and agreements thereto, and the said Calvin West does hereby covenant and agree on his part that, during his natural life and the life of his said wife, he will in sickness and in health provide for her all the necessaries of life and such luxuries as may be suitable and proper considering their circumstances in life, that in case of her death, that he will provide a Christian funeral for her remains, pay all expenses thereof as well as for her last illness, and make no claim upon her personal estate whatever, real or personal, and shall have full control of it, the estate, and sell it at any time that she may see fit, and in

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case of her death prior to his she may will the same as she may see fit. And in the case of his death prior to her decease, she shall have out of his estate, or as she may choose, either in Government bonds, four per cent. bonds, the sum of one thousand dollars, and all the household furniture, and all my clothing, which shall be in full satisfaction and payment of all and every claim against his estate, including dower and all other allowances, including the two hundred dollars allowed her by statute.

"And the said *Elizabeth West* doth hereby accept the foregoing provisions on her part, and doth agree to comfort him in sickness and health, and in all things be a prudent and faithful wife and homekeeper for the said Calvin West, her husband, during their lives, and further agrees that she will sign such deeds and conveyances of the real estate of said husband as he may desire to sell and convey during the period aforesaid.

"And it is further agreed that if unhappy differences arise between them so as to prevent their residing together as aforesaid, then and in that event they will arbitrate such differences either by agreeing upon an arbitrator or by each choosing one, who in case of disagreement shall choose a third, and each shall and will abide their award, and sign all necessary deeds and agreements to perfect and carry out such award.

"And it is further agreed that neither of said parties shall contract any debts or liability without the consent of the other.

"In witness whereof the said parties have hereunto set their hands and seals the day and dates above written.

"Signed, sealed, and delivered the 16th day of March, 1886.

"In the presence of	CALVIN his × mark. WEST,	[SEAL.]
"T. H. WALKER,	E. WEST,	[SEAL.]"
"C. E. W. FELCH.		

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The defendants appeal from a judgment in favor of the plaintiff.

For the appellants there were briefs by *A. S. Spooner*, attorney, and *Cate, Jones & Sanborn*, of counsel, and oral argument by *A. S. Spooner* and *D. Lloyd Jones*.

For the respondent there was a brief by *Raymond & Brennan*, and oral argument by *John Brennan*.

Orton, J. The facts of this case are substantially as follows: On the 19th day of October, 1882, one Calvin West, a widower, and the father of several children, at the age of eighty-five years, then residing in Walworth county, in this state, and the owner of a half section of land in section 25, township 1, range 15 E., lying in said county, intermarried with the plaintiff, then one *Elizabeth Butler*, a widow, and twice before married, and the mother of at least one child, then being in said county, and of the age of sixty-one years, and for a time they lived in the house and on the homestead of the said Calvin West on said land. A short time before said marriage, and on the 16th day of August, 1882, the said parties entered into a written antenuptial agreement, signed by both of them in the presence of witnesses, by which the said Calvin West agreed to give to the said *Elizabeth* $1,000 from his estate, on his death, if she survived him, and her support as long as she lived, in consideration and in lieu of her dower in his lands, and in full of all allowances whatever and claims against his estate; and the said *Elizabeth* agreed to marry the said Calvin, and be to him a true and faithful wife. This contract was executed in duplicate, and delivered to each party respectively. This is the substance of the contract as derived from the testimony of witnesses, the originals having been lost or destroyed. This would seem to be the substance of the agreement, but it was probably put in better form, having been drawn by A. S. Spooner, Esq., an attorney at law of

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said county, who, together with Spencer H. West, one of the sons of the said Calvin, about sixty-five years of age, and a witness to said contract, and *T. H. Walker, Esq.*, an attorney at law of the county of Portage, and administrator of the estate, who had seen the contract, testified of its contents. The terms of this contract were few and short, and could easily have been remembered, and all of the witnesses, including the said *Walker*, substantially agreed as to the terms thereof.

The learned circuit court found "that the said Calvin West and the plaintiff in this action, prior to their marriage, made an antenuptial agreement of some kind, but what were the terms of such agreement in full does not satisfactorily appear from the evidence." We are compelled to differ from the learned circuit court and hold that the terms of said agreement do both satisfactorily and sufficiently appear, and that said agreement was valid and binding on both of said parties as an antenuptial agreement, by which the plaintiff surrendered her right of dower in the lands of said Calvin West, and all claims against his estate, in consideration of her support during her life, and $1,000 of his estate. The plaintiff herself testified that the agreement was signed by both of them, and one of them delivered to her, and that it was executed two or three months before their marriage. In *Wilson v. Holt*, 83 Ala. 528, an antenuptial agreement that had been destroyed was established on less evidence. There was perfect agreement of the witnesses as to its contents, and no contradictory testimony on the question. At the time of said marriage, the plaintiff had known the said Calvin West for twenty years, and she was entirely destitute of property and of means of support, except the use of a house and lot. This agreement was made in view of their prospective marriage, and their marriage was one of its stipulations, and based upon its faith and validity. It may be said to have been one of

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the inducements of the marriage, and one of the conditions upon which it took place, and we might almost say that it would not have taken place without it.

The great importance and materiality of this antenuptial agreement sufficiently appears. Calvin West died on the 28th day of March, 1886, where he had lived with the plaintiff for some time, at the residence of the plaintiff's married daughter in Portage county, in this state, with whom they had been boarding. He left a personal estate, valued by the referee at $10,000, and proved to be worth $17,000, and said real estate was appraised at about $9,000. He left a will, by which he devised to the heirs of six of his children, and to an adopted son, all of his property, in certain amounts, to the extent of about $6,000, and the residue thereof to be equally distributed between his heirs at law. Letters of administration were granted by the county court of Portage county to the said *Walker*, one of the respondents. About two weeks before the said Calvin West died, he executed an instrument in writing, drawn by the said *Walker*, of substantially the same terms of said antenuptial agreement, with the additional stipulation on his part giving to the plaintiff all his household furniture and clothing, and making the $1,000 payable in government bonds. This instrument repeats that it should be in full satisfaction and payment of all and every claim against his estate, including dower and all other allowances. There is only one stipulation in said instrument on her part, in addition to those in said antenuptial agreement, but of no particular consequence, and that is that neither should contract debts without the consent of the other. The first clause of this instrument is that "all previous contracts and agreements thereto" are thereby revoked and made null and void.

This action is brought in the Portage county circuit court, where the said Calvin West died. It is stated in the complaint that the plaintiff filed in said county court of Portage

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county, on the 13th day of January, 1887, a notice in writing that she elected to take the provision made for her by law, instead of any other provision, and claiming her right of dower in the lands of which her husband, the said Calvin West, died seised, and the same rights to the homestead, and the same share of his personal estate as if he had died intestate. This action is brought to have it adjudged that the plaintiff is entitled to dower in the aforesaid real estate, and to have it assigned to her, and to have the homestead therein set apart to her, and her share in the personal estate adjudged to her; and such is substantially the prayer of the complaint, and such is substantially her recovery in the action by the findings and judgment.

The above last-mentioned instrument was introduced in evidence by the learned counsel of the plaintiff, in order to show that the said antenuptial agreement had been canceled and revoked, and they so contend on this appeal; and it appears that she has set aside and waived said instrument also, and now demands her legal rights in the estate, or the provisions made for her by law; and this claim was sanctioned by the circuit court. This statement of the case makes intelligible the questions of law raised on the appeal.

1. The learned counsel of the appellants contend that the circuit court of Portage county, in which the suit is brought, had no jurisdiction of the case; that it is a local action, and should have been brought in the Walworth county circuit court, within whose jurisdiction the lands are situated. Without following the argument of counsel to any further extent, the present statute appears to settle the question beyond controversy by the clear and explicit terms thereof. Sec. 2620, R. S., provides that "every action named *in either of the classes in the first subdivision of the preceding section* must be commenced in the county in which the property, or some part thereof, is situated, *subject to a change of the place of trial, as hereinafter provided.*" Then follows, in

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the next section, the provision that, "when the county designated in the summons or complaint in any action is not the proper place of trial thereof," — and the section goes on to provide for the removal of the case to the proper county in the usual way as to all actions. This must be the way to remove all those local actions "named in either of the classes mentioned in the first subdivision of the preceding section," for it is the way *thereinafter provided*, and there is no other provision thereinafter that could have been referred to in the clause, "subject to a change of the place of trial, as hereinafter provided." This action is named in one of the classes in the *first* subdivision of the preceding section — to wit, in the first class — "for the recovery of real property," etc. These sections cannot be otherwise construed without violating their obvious sense and language. Such is the construction given to these provisions in *Woodward v. Hanchett*, 52 Wis. 482, where it is held that this method of changing the place of trial to the proper county is applicable as well to actions "which are *local in their nature*, as to actions which are by statute made local by reason of the residence of the defendant or other cause;" and that "*any action* may be tried in the county designated in the summons or complaint, unless changed" in the manner pointed out in sec. 2621, R. S. Although the action in that case was not a local action in the sense of this action, yet it involved the construction of all of these provisions in order to harmonize them and the practice under them. We see no reason to change the opinion there given, and it may be considered a settled question. There not having been any steps taken to change the place of trial as required by the last-mentioned section, the action was properly triable in the county where it was commenced.

2. The main and important question in this case is, What effect had the post-nuptial instrument on the antenuptial

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agreement? It will be observed that this instrument makes but little change of that agreement. The plaintiff is to have the furniture and clothing of the deceased. She testified that, after her marriage with the said Calvin West, she had to use her own furniture in his house, because he had none, and from his great age and penurious habits, as she describes them, he could not have procured much furniture of his own afterwards. His clothing would certainly be of scarcely any value to her. The change made in the antenuptial agreement by this instrument was very slight, and scarcely worthy of the name. The testimony on behalf of the plaintiff would seem to show that the old gentleman was very greatly troubled, and felt grieved that he had made such a small and inadequate provision for the plaintiff in that antenuptial contract, and that he wanted that agreement destroyed, and to make another and better provision for her. All his anguish and anxiety, and all his good and liberal intentions, about which there is much display in the testimony, finally resulted in adding to his former benefaction a very small lot, if any, of poor furniture, and his old clothing. This would be intensely ludicrous, if it was not for the obvious mental weakness, and the want of adequate appreciation of even small things, of Calvin West, in consequence of his great age, and so near his death. It would seem that there must have been some other reason than such a very slight change in the antenuptial agreement for having it destroyed, canceled, or superseded by this new instrument. Was the legal effect of this instrument, as now claimed in behalf of the plaintiff, then contemplated and understood? Was it for the purpose of getting rid of the antenuptial contract, the benefits of which the plaintiff would be unable to waive and claim her rights in the estate under the law, and of having this post-nuptial agreement take its place, the benefits of which she could so waive and claim such rights? Calvin West was then about ninety

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years of age, and it was within two weeks of his death. He could not have been expected to live long at the longest. Under such circumstances, does it not appear strange that he should stipulate at length in this instrument that he will provide for the plaintiff the necessaries, and even the luxuries of life, and for her Christian burial, and make no claim on her real or personal estate, and, in case of differences between them, that they should be arbitrated. Was this to make a show of a new and original agreement between them, that they were incompetent to make as husband and wife, and that she could repudiate after his death? One thing is very certain, that Calvin West did not understand such a legal effect of the instrument. He evidently understood that it was a mere amendment of the antenuptial agreement, or addition to it of those two articles of property, his furniture and clothing. The witness *Walker*, who was employed to draw the instrument, testified that he said "he had not done fair" by the plaintiff in the former contract, and "he wanted it *altered*," and that "he wanted me to *amend* it," and "wanted to give her, *in addition* to what she had in the other one, the household furniture." *Mr. Walker* drew the instrument from the old agreement that he had by him, and he was asked by Mr. West if the old one was of any further use, and he told him that he did not think it was. He asked if he had any right to make another contract, and *Mr. Walker* told him that he had, and that the old one would be no good after this one was made. He said that "he wanted to make a *change* in the old contract." This testimony shows conclusively that Mr. West did not suppose that he was entering into a new contract and that the effect of the old one would be destroyed by it. He thought that the old one need not be preserved, because it was included in the new one, and that the old one was merely rewritten or copied into the new one, with the "*addition*," "*amendment*," "*change*," or "alteration," by insert-

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ing in it the furniture and clothing. That was really all the change there was. He was bound by the first one to support the plaintiff during life.

It follows that the validity of the old contract was not destroyed or in any way affected by the new one; but was merely altered or changed in that one respect. Beyond what was copied from the old contract, it did not require her signature. It was his sole act. It was the additional gift of the furniture and clothing. The same consideration is preserved. It was not a new contract, or any contract between them which he or they could not make in consequence of their marriage. He had a right to change the old agreement, and give her more than it provided; and he did so, and she accepted it. That is all there is of it. If he was under any disability to so change the antenuptial agreement, then it was not changed. It is very clear that there was no intention to destroy that agreement so as to destroy or impair its legal effect. It was perpetuated and continued in the new instrument. This is the only reasonable construction of the transaction. The claim, therefore, that this instrument canceled and avoided the antenuptial agreement so as to render it of no effect, and that the plaintiff had the right to waive the benefits of the so-called second agreement, and take under the law, is unfounded; and the findings and judgment of the court to that effect are not supported by the evidence. The plaintiff is bound by said antenuptial contract as changed or altered by the said instrument; and her interest in the estate of Calvin West, deceased, must be measured by what she agreed to receive therefrom in and by said agreement, so altered. She has no dower interest in said lands, or any interest in said estate, under the law, or except as so stipulated in the agreement so changed or altered. The evidence by which these facts appear was introduced by the plaintiff, and therefore the objections to it,

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made by the appellants, need not be considered. The plaintiff is bound by it.

It is contended by the learned counsel for the respondent that it appeared from the evidence that the said Calvin West deceived the said plaintiff as to the extent and value of his property, by failing to inform the plaintiff thereof, and that if she had known the extent and value of the same she would not have entered into said antenuptial agreement, and that she was defrauded therein, and that therefore said agreement is void and of no effect. The testimony is that the plaintiff had known the said Calvin West for about twenty years before that time, and that she had lived in his vicinity and among his relatives. These facts, together with her omission to make any inquiry about it, would seem to repel any claim that she was ignorant of it. But she is estopped by having accepted an alteration of said agreement by the addition of the household furniture and clothing of the said West, by said instrument, which increased her interest in his estate but very little, if any, after she had lived with him over four years, and must be presumed to have known then the extent and value of his estate; and she insists upon the validity of such subsequent agreement, and the effect thereof to cancel and destroy the antenuptial agreement. This shows very clearly that she either knew the value of his estate or would not have refused to enter into said agreement if she had known it, for she repeated the agreement with such slight alteration after she did know it.

This is a question of fact on the evidence with this court, and the legal principles involved are elementary and need no authorities; and the questions argued by the learned counsel on both sides need not be considered so far as they relate to the case, treating the instrument last made as an original agreement, valid or otherwise. The plaintiff has

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not asked any relief under either of said agreements so called, and she therefore has no further use for the action, and it should be dismissed, that she may obtain her interest in said estate by virtue of the antenuptial agreement so altered.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the complaint on its merits.

WILLIAMS, Respondent, vs. RICHES, Administratrix, Appellant.

September 26 — October 14, 1890.

PROMISSORY NOTES: EVIDENCE. (1) *Proof of execution by person since deceased.* (2) *Comparison of handwriting.* (3) *Admissions.* (4) *New trial for newly discovered evidence: Discretion.*

1. In an action upon a promissory note purporting to have been executed by defendant's intestate, R., who signed by making his mark, the payee's daughter testified that two indorsements of payments thereon were made by her at the request of both R. and her father. Another witness testified that he assisted at an attempted settlement between R. and the payee, and that a note of R. was then presented by the payee, which he believed to be the one now in suit. *Held*, that the evidence of the execution of the note by R. was sufficient to support a verdict for the plaintiff.
2. The payee's daughter having been only ten years old when she wrote the first indorsement, and thirteen years old when she wrote the second, it was not error to refuse to compel her to rewrite the indorsements for comparison at the trial, she being then twenty-one years old and having testified that her handwriting had very much changed and improved.
3. In an affidavit for a continuance the plaintiff had stated that he could not safely go to trial without the testimony of one W. H., whom he believed to have made the second indorsement on the note. This affidavit was offered as evidence by the defendant, but was rejected. The father of W. H. testified that the plaintiff had told him, prior

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to the trial, that W. H. made one of the indorsements. The plaintiff testified that he did make such statement; that he was induced to do so from comparing W. H.'s handwriting with the indorsements, but knew nothing about the fact; and that he was afterwards informed that the payee's daughter made the indorsements. *Held*, that the exclusion of the affidavit was not error for which the judgment would be reversed.

4. The denial of a motion for a new trial on the ground of newly discovered evidence will not be held an abuse of discretion where it does not appear that such evidence would probably produce a different result.

APPEAL from the Circuit Court for *Portage* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action was commenced February 15, 1888, upon a promissory note dated October 2, 1876, alleged to have been executed by the defendant's intestate, John Riches, payable to the order of one Thomas Welch, for $326.75, payable April 25, 1877, with interest. It is alleged in the complaint that there was paid and indorsed thereon to Welch, April 10, 1879, $25; also, June 1, 1882, $35; and that Welch indorsed and transferred the note to the plaintiff, September 20, 1886. The answer denied each and every allegation of the complaint, and specifically denied the signing and execution of the note, and alleged that if the note was ever executed by John Riches it had been fully paid and satisfied while in the hands of Thomas Welch; and also pleaded the six years statute of limitations. At the close of the trial, the jury returned a verdict in favor of the plaintiff, and assessed his damages at $708.70. From the judgment entered upon that verdict, the defendant appeals.

For the appellant there was a brief by *Raymond & Brennan*, and oral argument by *John Brennan*.

For the respondent there was a brief by *Synon & Frost*, attorneys, and *Cate, Jones & Sanborn*, of counsel, and oral argument by *D. Lloyd Jones*.

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CASSODAY, J. Under the pleadings, the plaintiff was required to prove the execution of the note by John Riches. Sec. 4192, R. S. The evidence of such signing by John Riches was certainly very weak. The note purported to be signed by John Riches' making his mark. It was proved that neither he nor the payee, Thomas Welch, was able to write his name. The daughter of Mr. Welch testified to the effect that April 10, 1879, and when she was about ten years of age, at her father's house, and at the request of both her father and John Riches, she then and there made the indorsement thereon of $25, as it appeared on the note; that June 1, 1882, at the house of her father, and at the request of both John Riches and her father, she then and there made the indorsement thereon of $35, as it appeared on the note; but that she saw no money paid on either occasion. There was also testimony of another witness to the effect that he was present at an attempted settlement between Thomas Welch and John Riches, in 1882; that he acted in behalf of Welch in the matter of such settlement; that a note held by Welch against Riches was brought up, and the note presented by Welch at that time; that he believed the note in question was the same note thus presented. We must hold that such evidence was sufficient to support the verdict, and hence that the trial court properly refused to grant the nonsuit, and also properly refused to set aside the verdict for want of evidence.

We do not think there was any error in refusing to compel the witness Miss Welch to rewrite the indorsement on the note in the presence of the jury, as the defendant's counsel should read it to her, for the purpose of being used in evidence,— especially as the indorsements were long before, and she had testified to the effect that her handwriting had very much changed and improved since she made the indorsements on the note.[1]

[1] The witness testified that she was twenty-one years old at the time of the trial.— REP.

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There is no reversible error for rejecting, as evidence on the part of the defendant, an affidavit made by the plaintiff for the purpose of continuing this cause in the trial court for the reason that he could not safely proceed to such trial without the testimony of one William Houston, whom he believed to have been present and to have made the last indorsement on the note by direction of John Riches. The defense was allowed to prove, and did prove, by William Houston's father, that some six months prior to the trial the plaintiff told him, in effect, that his son William made one of the indorsements on the note,— the first indorsement. The plaintiff thereupon testified to the effect that he did make such statement; that he was induced to do so from comparing William Houston's handwriting with such indorsements; that he at that time knew nothing about the fact, but was simply trying to find out who made the indorsements; that, subsequently, he was informed that it was the daughter of Mr. Welch.

The learned counsel for the defendant insists that a new trial should have been granted upon the ground of newly discovered evidence. The affidavits in support of such motion are voluminous, and the same is true in respect to those used in opposition to such motion. We have carefully read all these affidavits, and we are not prepared to say that such newly discovered evidence is of such a character as would probably produce a different result; and hence the court was justified in refusing to grant the motion. *Grace v. McArthur*, 76 Wis. 641. The question was largely in the discretion of the trial court, and we would not feel justified in holding that there had been any abuse of such discretion.

We find no reversible error in the record.

By the Court.— The judgment of the circuit court is affirmed.

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CHANDOS, Administrator, Respondent, vs. MACK and another, Appellants.

September 27 — October 14, 1890.

Public lands: Grants: Unsurveyed island.

A grant from the government, without reservation, of lands on the bank of a navigable river, vests in the purchaser the title to any unsurveyed islands lying between the main land and the center of the stream.

APPEAL from the Circuit Court for *Wood* County.

Ejectment. The answer admits that the defendants are in possession of the land, but denies that the plaintiff has any title or interest therein or any right to the possession thereof, and alleges that the same is a part of the public domain of the United States. The case was tried by the court, a jury having been waived. The facts will sufficiently appear from the opinion. The defendants appeal from a judgment in favor of the plaintiff.

For the appellants there were briefs by *Silverthorn, Hurley, Ryan & Jones*, and oral argument by *G. D. Jones*. They contended, *inter alia*, that it is settled by the laws of the United States that proprietors of lands bordering on rivers navigable in fact, *under title derived from the United States*, hold title only to the stream, and this without regard to the decisions of the courts of the several states as to the ownership of the shores and beds of such streams. *The Daniel Ball*, 10 Wall. 557; *Railroad Co. v. Schurmeir*, 7 id. 272; *Yates v. Milwaukee*, 10 id. 497; *St. Clair Co. v. Lovingston*, 23 id. 46; *Barney v. Keokuk*, 94 U. S. 324. The rule in this state which gives the riparian proprietors the shores and beds of navigable streams, is not at variance with the decision in *Railroad Co. v. Schurmeir*, but merely gives them the rights which, under the decision in *Pollard v. Hagan*, 3 How. 212, properly belonged to the state and

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not to the United States. *Barney v. Keokuk*, 94 U. S. 324; *Olson v. Merrill*, 42 Wis. 211-212. But the decision in *Pollard v. Hagan*, declaring the title to the shores and beds of navigable streams to be in the states respectively, did not yield to the states the title to the islands in navigable streams. And clearly the center or thread of the stream, which under the laws of this state bounds the interest of the plaintiff, is the center or thread of that channel which separates the island from her lots 3 and 4. This is the "*watercourse*" which, under *Railroad Co. v. Schurmeir*, should be taken as the "*boundary*" of the lands conveyed by the United States; and it was error to ignore the existence of this channel, so plainly marked and indicated on the original government plat. See, besides cases above cited, *Benson v. Morrow*, 61 Mo. 345; *McManus v. Carmichael*, 3 Iowa, 1; *Middleton v. Pritchard*, 4 Ill. 510; Gould, Waters, secs. 68, 69, 77; *Watson v. Peters*, 26 Mich. 508; *Shoemaker v. Hatch*, 13 Nev. 261; *Schurmeier v. St. P. & P. R. Co.* 10 Minn. 82; *St. Paul, S. & T. F. R. Co. v. F. D., St. P. & P. R. Co.* 26 id. 31; *Indiana v. Milk*, 11 Fed. Rep. 389.

For the respondent there was a brief by *Gardner & Gaynor*, and oral argument by *Geo. R. Gardner*.

COLE, C. J. There is no dispute about the facts in this case, but the counsel disagree as to the law arising upon those facts. The action is ejectment, brought by the plaintiff's intestate, who claimed to be the owner, as riparian proprietor, of an island in the Wisconsin river, a navigable stream. She held and owned under various mesne conveyances the title derived from the general government of lot 4 in section 8 and lot 3 in section 17, township 22, range 6 east, which lots lie on the main west bank of the river, opposite to the island in controversy. She claimed that she was entitled to the possession of this island by virtue of the grant of the general government of lots 3 and 4

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to those under whom she derived title, except as to certain rights which the defendants have under a deed that is mentioned in the evidence, but which does not affect any question in issue here.

The island lies near the west bank of the river, as we have said, opposite lots 3 and 4; is west of the main channel and west of the thread of the stream, and also west of the main navigable portion thereof. It is separated from the west bank of the river by a narrow channel or slough, which varies in width from 95 to 100 feet, and is separated from the east bank of the river by a channel which varies in width from 320 to 700 feet. The channel between the island and the west bank of the river has not been used since the settlement of the country for purposes of navigation, except to run out lumber manufactured at the mills on the main land on the west bank. The portion of the river used for the purpose of navigation is the main channel east of the island. The island is about 1,250 feet in length, and varies in width from 70 to 300 feet; it is a rocky formation, covered with a thin, sandy soil, and was originally covered with timber, which has been removed. It lies up and down the river, nearly parallel with the thread of the stream. It is not overflowed in ordinary freshets, but is substantially submerged in extraordinary floods. The island contains between two and three acres of land. When the general government, by its agent, surveyed and platted lots 3 and 4, and the lands on either side of the river opposite the island, it made no survey or plat of the island or of any part of it; nor has the government ever surveyed and platted it, although the location of the island is marked upon the government plat of the survey of the lands opposite and adjacent thereto. The government many years since disposed of all its lands on the river opposite and adjacent to the island, and there is nothing which tends to show that the government intended to reserve the

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island as a part of the public domain. The island is referred to in the field-notes of the meandered line, but it was not surveyed, though its location is marked upon a plat of surveys, so the fact of its existence was not overlooked by the agents of the government when such surveys were made.

Now, the question in the case is, To whom does the island belong? Did it pass to the purchasers of lots 3 and 4 on the bank of the river opposite to it. The island lies between these lots and the middle of the river, and there is nothing to show, as we have said, that the government intended to reserve any right or interest in the island. As there was no such reservation, the presumption is that the government did include it and pass all title to it to the purchaser.

On the part of the plaintiff it is insisted that the title did pass to the purchaser of lots 3 and 4 on the west bank of the river. The position of the learned counsel is this: He says when the general government, by its agents, surveys a section of land lying partly in a navigable stream, which embraces islands of various sizes in such stream, subdivides the entire section into such lots and subdivisions as it sees fit, and leaves some such islands unsurveyed, and places the same in market, and disposes of all said lots and subdivisions so surveyed and platted; that then it has parted with its entire interest in the section to the purchasers, who, as riparian proprietors, take under their respective grants to the middle of the stream; that, under such circumstances, the presumption is that the government intended to make no reservation, but intended that all its title should pass by its grant, as in case of a private conveyance. It seems to us there is great force of reason, and much good sense, in this view of the law. In this state the settled rule is that a grant by an individual of land which is bounded on a navigable stream vests in the grantee the title in the bed of the river to the thread of the stream, subject to the public right

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of navigation. The cases in this court where this doctrine has been laid down are numerous, but are so familiar to the profession that it is unnecessary to cite them. The precise question, however, here presented,— whether the title of an unsurveyed island between the shore and middle of the stream would pass to the purchaser,— has not been directly decided; but we see no principle of law or good reason for holding that it would not so pass. The inference certainly is very strong, when the government leaves a small island in a navigable river, lying between the shore and middle of the stream, unsurveyed, and sells all the surveyed islands and all the lands on both sides of the river, that it intends to abandon all right to such unsurveyed island and let it pass to the riparian owners of lands on the river as an incident to its grant. It seems formerly to have been the policy of the government to survey islands omitted from the general survey, and sell them, but, from a letter of the acting commissioner of the general land office, which was introduced on the trial, it appears that this practice has been abandoned because it was found disadvantageous to the public interest, and applications for such surveys are no longer entertained. This item of evidence gives additional strength to the inference as to the effect of the grant itself from the government,— that, where no right is reserved, the grant of lands on the bank of the river vests in the purchaser the title of any unsurveyed islands lying between the main land and the center of the stream, since the government no longer desires to assert any interest to an island thus situated and omitted in the original survey.

"In the case of *Middleton v. Pritchard*, 4 Ill. 510, the supreme court of Illinois held that, when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such res-

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ervation, the grant includes all that would pass by it if it were a private grant; and that, as the United States had not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi river, separated from the adjoining land by a slough, the title of the riparian owners extended to the thread of the river and included the island." Gould, Waters, § 69. So, "in *Railroad Co. v. Schurmeir*, 7 Wall. 272, the question was as to the title to an island in the Mississippi river, which, at the time of the survey, was a mere sand-bar, about 90 feet wide and 160 feet long, separated from the main-land by a slough or channel 28 feet wide. The island was submerged at high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main river. At the time of the action, the sand-bar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction and a railroad company which claimed the bar under a new survey made by a United States surveyor, and a Congressional grant of certain odd-numbered sections. It was held that the sand-bar was included in the first survey as a part of the main-land." Gould, Waters, § 77. See same case, *Schurmeier v. St. P. & P. R. Co.* 10 Minn. 82.

It seems to us that the decision in the last case is decisive of the one before us. It is true, as observed by plaintiff's counsel, there are facts in the case at bar much stronger in favor of the plaintiff than in the *Schurmeier Case.* The general government had actually conveyed the island in controversy there, and attempted to grant it to the state of Minnesota for certain purposes, and the defendant claimed under the state. But in the case before us, there is no pretense that the government has ever surveyed or attempted to convey this island as a lot separate from the survey and conveyance of lots 3 and 4 on the adjacent main shore, or that it has ever claimed, or now claims, to be the owner of

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the island, nor is there any pretense that the patent of the general government, issued on the sale of those lands, reserved any right or interest that would ordinarily pass, by the rules of law, to the patentee, or that it did any act indicating an intention to make a reservation. The quantity of land included in the island was never ascertained or attempted to be sold, and we think it must be deemed to have been included in lots 3 and 4, and to belong to the riparian owner of those lots.

This view renders it unnecessary to consider the question whether the plaintiff acquired any title from the state by virtue of the patents offered in evidence.

By the Court.— The judgment of the circuit court is affirmed.

LOGAN and others, Respondents, vs. TRAYSER and another, Appellants.

September 27 — October 14, 1890.

Partnership: Accounting: Contribution: Res adjudicata.

1. In an action in the names of all the other partners against the heirs of a deceased partner to recover the amount of the firm indebtedness, over and above its assets, chargeable to such deceased partner, an accounting was had and the amount of such indebtedness which each partner was bound to pay was determined. *Held*, that thereafter an action at law might be maintained by partners who had paid the whole of such indebtedness, to recover from the other surviving partners their proportionate share thereof.
2. The defendants in the second action having known that the first action was prosecuted to judgment in their names as plaintiffs, and never having objected thereto, are bound by such judgment, although such first action was commenced without their advice or consent.
3. An adjudication in the first action that the plaintiffs therein had paid all the indebtedness of the firm, was not an adjudication that

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each had paid his proportionate share thereof, and therefore does not bar the second action.

4. In the first action the plaintiffs were charged in the accounting with the value of some partnership property then in their possession, such value being applied to reduce the amount of the indebtedness of which each partner was adjudged bound to pay his proportionate share. *Held*, that the defendants in the second action were not entitled to further credit for their share of the value of that property.

APPEAL from the Circuit Court for *Waupaca* County.

In January, 1877, the plaintiffs and defendants and one Dixon formed a copartnership, under the name and style of the New London Stave Company, for the purpose of carrying on a general stave business at the city of New London. There were six equal partners in the firm or company, the defendants, under the firm name *Trayser & Dickinson*, being one of the partners, and Dixon being another. The copartnership continued until April, 1881, when it was dissolved by the death of Dixon. It was then insolvent. The surviving partners proceeded to wind up the affairs of the company, and paid all its indebtedness. After this was done, such surviving partners, including the defendants in this action, brought an action in equity against the heirs of Dixon for an accounting of the copartnership affairs, and to recover of such heirs the amount of the indebtedness of the firm over and above its assets which in equity would have been chargeable to Dixon, as one of the copartners, had he lived. The action was tried and an accounting had therein as prayed. The court found the facts above stated, and that the indebtedness of the stave company, which the plaintiffs had paid, was $11,728.23, one sixth of which, or $1,954.70, was chargeable to the estate of Dixon, and judgment against the heirs of Dixon, who were found chargeable with the latter sum, was entered accordingly. On appeal to this court such judgment was affirmed. 73 Wis. 533.

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This is an action at law brought by the plaintiffs, four of the surviving partners in the stave company, to recover of the defendants (who jointly constitute the remaining surviving partner therein) their proportionate share of such indebtedness. The complaint alleges that the plaintiffs paid the whole of such indebtedness. This was proved true on the trial, and is not controverted by defendants. The court directed a verdict for the plaintiffs for the portion of the deficiency found in the *Dixon Case* to be chargeable to each partner, and interest thereon. Judgment was entered pursuant to the verdict, from which the defendants appeal.

For the appellants there were briefs by *F. C. Weed*, attorney, and *Gabe Bouck*, of counsel, and oral argument by *Mr. Weed.*

For the respondents there was a brief by *Gary & Forward*, and oral argument by *C. H. Forward.*

LYON, J. 1. The defendants moved for a nonsuit on the ground that the case involves the necessity of an accounting between the partners in the stave company, and that no action at law can be maintained against them to recover the proportion of the indebtedness of the company chargeable to them, until an accounting shall have been had in equity and such proportion thereby ascertained. The motion was denied, and such denial is assigned as error. We think the ruling correct. Such accounting was had in the action against the Dixon heirs, and the amount of the deficiency which, as between themselves, each partner ought to pay, was there ascertained and adjudged. The defendants were parties to that action, and, under a familiar rule of law, are bound by the adjudication.

In their answer the defendants deny that they consented to be made parties to the Dixon suit, and allege that it was commenced without their advice or consent, and claim that for those reasons they are not bound by the judgment

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therein. They do not deny they knew the suit was commenced and prosecuted to judgment in their names as plaintiffs, and it does not appear that they ever made any objection thereto. They must be held bound by the judgment.

When the judgment was rendered in the *Dixon Case*, the business affairs of the stave company had been closed, and no change afterwards occurred in the relations of the surviving partners to each other, or in their rights or liabilities in respect to each other. It is plain therefore that there was no necessity for a further accounting in equity, between the surviving partners, of the affairs of the company. Each partner was a surety for the others for the payment of their respective shares of the deficiency thus ascertained, and if one of them paid the share of another, he may maintain an action at law against such other for money paid for his use and benefit. This is such an action.

2. It was alleged in the Dixon suit, and so adjudged, that the plaintiffs therein had paid all the indebtedness of the stave company. Inasmuch as the present defendants were plaintiffs in that suit it is claimed this is equivalent to an adjudication that they had paid their due proportion of such indebtedness, and that the plaintiffs are concluded thereby. Probably the proportion of the indebtedness of the stave company paid by each surviving partner might have been determined in the Dixon suit, but it was not. It was only found that the plaintiffs collectively had paid such indebtedness. Had these defendants asked the court to determine what sum each partner had paid thereon, and to settle the equities between the surviving partners, doubtless the court would have done so. But they made no such request, and were satisfied with the judgment as rendered. Under these circumstances it would be most unjust to force the construction contended for of the judgment in that suit, and thus relieve the defendants from the payment of money which the plaintiffs — their sureties — have paid for them,

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and which the defendants admit they have not repaid. We conclude the judgment in the former suit is not a bar to this action.

3. When the accounting was had in the Dixon suit, the surviving partners had on hand a quantity of the machinery of the stave company, which they had removed to Chippewa county. In the accounting in that action the plaintiffs therein were charged with the value of such machinery, fixed at $1,800. It is not claimed that it was of any greater value. The defendants claim, however, that they had nothing to do with the removal of the machinery, and that they should be allowed in this action their proper share of such value, being $300. This claim cannot be allowed. The value of the machinery has been applied to the payment of the indebtedness of the stave company, and reduces the recovery in this action just $300. The removal of it to Chippewa county without defendants' consent is of no significance. The matter stands precisely as it would have stood had the surviving partners, or any of them, sold the machinery while it was at New London for $1,800, and with the proceeds of the sale canceled to that amount the indebtedness of the stave company. In either case the defendants realized their share of such proceeds by a corresponding reduction of the indebtedness of the stave company for which they were liable.

The law being with the plaintiffs, and there being no controversy on the facts, the court properly directed a verdict for the plaintiffs for the sum they had paid for the defendants, and interest thereon.

By the Court.— The judgment of the circuit court is affirmed.

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LUTZ, Respondent, vs. COMPTON, Appellant.

September 27 — October 14, 1890.

(1) Vendor and purchaser of land: Inability to convey: Recovery of money paid: Tender of deed after action brought. (2) Evidence: Unrecorded plat.

1. The vendor of land who had not the title thereto at the time specified in the contract for the conveyance, cannot defeat a recovery of the money paid on the contract by procuring title and tendering a conveyance after the commencement of the action.
2. An unrecorded plat of additions to a city may be admissible in evidence to prove the location and identity of a lot described in a contract for the sale thereof by reference to such plat.

APPEAL from the Circuit Court for *Wood* County.

The facts are sufficiently stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff.

H. W. Remington, for the appellant.

Geo. L. Williams, for the respondent.

ORTON, J. This action is brought to recover the consideration money in part paid on a contract between the parties for the purchase of a lot in Neeves' first and second additions to the city of Grand Rapids, by the plaintiff of the defendant, on the grounds (1) that the defendant falsely represented that he owned the whole lot; and (2) that the defendant was unable to convey to the plaintiff said lot. The court ordered the jury to find a verdict for the plaintiff, presumably on both grounds. It was proved on the trial that the defendant had sold, before the contract was made, a strip off of said lot, of twenty by forty feet, and after the suit was commenced the defendant procured the title to said twenty by forty feet, and tendered a deed thereof to the plaintiff. That of course was too late to remedy the defect, for the plaintiff was entitled to a perfect deed of the whole lot when it was due according to the

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contract, and the case must be tried on conditions existing at the time of the commencement of the suit. The defendant attempted to show title in himself of the whole lot, by certain tax deeds, but the description of the property in all of them was so uncertain and imperfect that it was impossible to locate it. The plaintiff introduced the plat of said additions, which had not been recorded. It was objected to by the defendant, but received in evidence. The error, if any, was cured by the defendant afterwards making use of the same plat, but it was admissible in evidence to prove the location and identity of the property. *Vilas v. Reynolds*, 6 Wis. 214; *Simmons v. Johnson*, 14 Wis. 523. The court properly directed a verdict for the plaintiff, at least on the second ground, and that was sufficient.

By the Court.— The judgment of the circuit court is affirmed.

JONES, Respondent, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

September 29 — October 14, 1890.

Railroads: Wilful or grossly negligent killing of horse on track: Court and jury.

In an action against a railroad company for the wilful or grossly negligent killing of a mare which got upon the track in the night-time without the fault of the defendant, it appeared that the train which killed the mare was running from thirty to thirty-five miles an hour; that the engineer first saw some horses on or near the track, and blew the whistle, whereupon they went in every direction; that he continued to sound the whistle until he got by the horses and supposed the track was clear; that after going some distance further he suddenly saw the mare running and stumbling on the track about 150 feet ahead of the engine; that it was then too late, and he did not try, to do anything, but struck the mare while going at full speed; and that, though it was a bright moonlight night, the en-

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gineer could not, from behind the headlight, see the track more than 150 feet ahead. There was also evidence that the engineer kept on sounding the whistle until he had passed some distance beyond where he first saw the horses, and that the mare had been running rapidly for some distance on the track before she was struck. *Held*, that the evidence was insufficient to support a verdict for the plaintiff.

APPEAL from the Circuit Court for *Columbia* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action is for damages for wilfully or by gross negligence killing a very valuable black mare belonging to the plaintiff, while trespassing upon the defendant's right of way.

The material facts are undisputed and to the effect that on October 12, 1886, the mare with other horses belonging to the plaintiff was in his pasture at the eastern part of the village of Cambria, some little distance north of such right of way; that between that pasture and the right of way was a field belonging to Hughes, through whose farm the railway ran in an easterly and westerly direction; that on the evening of the day named the mare and such other horses broke through the pasture fence, and went into the field of Hughes, and from thence south, through a gate which had been left open, onto the defendant's right of way a short distance east of the depot; that from there they passed along the right of way easterly, a distance of about 200 rods, to a point near the house of a Mrs. Davis near the right of way; that between 9 and 10 o'clock that night, a wild or irregular extra train with twenty-three loaded cars and two empty cars was running on a down grade, on its way westerly from Milwaukee to Portage by way of Horicon, at the rate of from thirty to thirty-five miles an hour, and just as it turned a curve at or near Mrs. Davis' house the engineer discovered a number of horses upon, at, and

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near the track; that he at once blew the whistle and the horses went in every direction; that he continued to blow the whistle until he got by the horses and supposed the track was clear; that he continued such speed until after he had passed through "Hughes' Cut," so called, 110 rods in length, and some seventy or eighty rods west of the house of Mrs. Davis; that suddenly he saw the mare running and stumbling on the track about 150 feet ahead of his engine; that it was then too late to do anything, and that he did not try to do anything, but struck her while going at full speed; that although it was a bright moonlight night, yet he could not see as well, by reason of such light, from behind his headlight, and could not see on that night more than 150 feet ahead of his engine on the track.

There was also evidence on the part of persons in the house of Mrs. Davis, and in a house on the hill a considerable distance north of there, that the whistle tooted most of the time from, at, or near the house of Mrs. Davis until the engine had passed through the Hughes' cut; that the next day tracks were found on the right of way, supposed to be those made by the mare; that they commenced some distance westerly from the house of Mrs. Davis; that the mare at first apparently walked for a distance of five or six rods; that she then apparently trotted on the track for a distance of about thirty-five rods; that she then ran on the track for a distance of about 104 rods to the place where she was found.

The court refused to direct a verdict for the defendant. The jury returned a verdict in favor of the plaintiff, and assessed his damages at $1,008.19. From the judgment entered upon that verdict, the defendant appeals.

For the appellant there was a brief signed by *John T. Fish*, attorney, and *Burton Hanson*, of counsel, and oral argument by *Mr. Hanson*.

J. H. Rogers, for the respondent, contended, *inter alia*,

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that the evidence showed that the engineer had chased the mare over 770 yards along the track, sounding the alarm all the way but not attempting to stop the train. This was proof of gross negligence. *Berkley v. C., R. I. & P. R. Co.* 3 West. Rep. 765; *Mo. Pac. R. Co. v. Vandeventer*, 26 Neb. 222.

CASSODAY, J. It is conceded that the mare and other horses were upon the right of way without any fault or negligence of the defendant. It is moreover conceded that the defendant is not liable unless the engineer wilfully or through gross negligence ran upon the mare. The speed of the train was very rapid, but no more so than usual on that portion of the defendant's road. Of course the engineer cannot be reasonably charged with wilful misconduct or gross negligence, unless he saw, or by the exercise of slight diligence might have seen, the mare in time to have prevented the injury. The mere fact that the engine tooted more or less for the distance indicated by the plaintiff's witnesses does not tend to prove that the engineer saw the mare for the whole or any considerable portion of that distance. After having passed the other horses, the tooting may have been prompted by overcaution, or by reason of the near approach to the depot. There are no facts or circumstances in the case which authorize the inference of such gross negligence, unless it be the mere fact that the mare was capable of, and in fact was, running very rapidly, and hence must have remained within the engineer's range of vision for a greater distance than if she had been standing still or not been running so rapidly. But we are to remember that it was in the night, and that the mare was black, and hence less likely to attract attention. Besides it is undisputed that the bright moonlight prevented the engineer, stationed as he was behind the head-light, from seeing the track for more than 150 feet ahead of the engine.

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He testified, in effect, that there was no time for him to do anything, and that an attempt, when so near, to stop the train, would simply have increased the danger to the train and those upon it. The train was running at the rate of thirty or thirty-five miles an hour, and it is not apparent that the engineer could, by the exercise of even great diligence, have prevented the injury. My brethren are all clearly of the opinion that the evidence is insufficient to support the verdict; and after careful consideration I have, with some hesitancy, been led to the same conclusion.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

ROBERTS, Respondent, vs. THE WISCONSIN TELEPHONE COMPANY, Appellant.

September 29 — October 14, 1890.

Telephone companies: Obstruction to use of highway: Court and jury.

1. Under a statute allowing telephone lines to be constructed and maintained along a public highway provided they do not obstruct or incommode the public use of such highway, telephone poles erected from four to six feet from the fence in an almost perfectly level highway are not such obstructions as render the company liable for personal injuries caused by runaway horses colliding with one of such poles.
2. The question whether the telephone company by placing its poles in the highway as stated, was negligent, or was guilty of a breach of legal duty, might properly be determined by the court on demurrer to a complaint setting forth the facts.

APPEAL from the Circuit Court for *Dane* County.

The facts alleged in the complaint are sufficiently stated in the opinion. The defendant appeals from an order overruling a general demurrer.

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For the appellant there was a brief by *Miller, Noyes & Miller*, and oral argument by *B. K. Miller, Jr.*

For the respondent there was a brief by *Lewis, Pfund & Briggs*, and oral argument by *H. E. Briggs*. They contended, *inter alia*, that the defendant was required to erect its poles so that they should not obstruct or incommode the public use of the highway. Sec. 1778, R. S. As against the defendant the right of the public to use the highway in question was not confined to the traveled track, although a town is only bound to maintain the latter. Wood, Nuis. (2d ed.), sec. 248; *Dickey v. Maine Tel. Co.* 46 Me. 483; *Comm. v. King*, 13 Met. 115; *Johnson v. Whitefield*, 18 Me. 286, 36 Am. Dec. 721. The question whether a telephone pole set some four feet from the fence in an almost perfectly smooth and level highway obstructs or incommodes the public use thereof, is one for a jury to determine. *King v. Oshkosh*, 75 Wis. 519; *Comm. v. Franklin*, 133 Mass. 569; *State v. M. & E. R. Co.* 25 N. J. Law, 437; *Winter v. Peterson*, 24 id. 524; *Blanc v. Klumpke*, 29 Cal. 156; *Bell v. O. & P. R. Co.* 25 Pa. St. 161; Thomp. Trials, secs. 1887-91; Wood, Nuis. (2d ed.), sec. 249; *Kenworthy v. Ironton*, 41 Wis. 647; *Whitney v. Milwaukee*, 57 id. 639; *Seefeld v. C., M. & St. P. R. Co.* 70 id. 221.

COLE, C. J. This is an action for personal injuries. It appears from the complaint that the plaintiff was riding with another man in a buggy along the highway, which was almost perfectly level and without any banks, borders, ditches, or rough or uneven places, or obstructions of any kind in it, except telephone poles which were set in the highway eleven rods apart, and about four or six feet south from the fence on the north side thereof. There were three traveled tracks about equally used by the public for traveling. The track on the north side of the highway was about eight feet from the fence on the north side of said highway,

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and about three feet from the telephone poles. The team was traveling on this north track, and it is alleged the horses were gentle and tractable, and were under the control of the driver when they were stopped to enable the plaintiff to get out of the buggy. While in the act of alighting from the buggy the horses were frightened by a team coming from behind, and ran along the highway, coming in collision with a telephone pole, and the plaintiff was thrown forward from the buggy, in which he had regained his seat, and was endeavoring to stop the horses, and sustained the injuries of which he complains.

Now, does the complaint state a cause of action? It appears to us that it does not. The only act of negligence complained of on the part of the defendant is the placing of telephone poles in the highway where they were set. These poles, as we have stated, were set from four to six feet from the fence on the north side of the highway, which would leave just room enough to permit the cross-arms on the poles to be entirely over the highway. Was it lawful to place these poles in the highway? The statute authorizes any corporation formed to build and operate telegraph lines or conduct the business of telegraphing to construct and maintain its lines, with all necessary appurtenances, along a public highway. Sec. 1778, S. & B. Ann. Stats. And in *Wis. Telephone Co. v. Oshkosh*, 62 Wis. 32, it was held that the statute included telephone companies, although such companies were not specifically mentioned therein. The poles then were not unlawful structures in the highway, but were authorized by law to be set therein. It is true the statute in effect declares that no telephone line or any appurtenance thereto shall at any time obstruct or incommode the public use of the highway. Assuming the facts as to the location of the telephone poles to be as alleged in the complaint, we think they did not show any actionable negligence. They would certainly constitute no

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obstruction to the use of the highway, nor would the team have collided with them if it had been under the control of the driver and properly managed. It was the fright and unmanageableness of the horses which was the real cause of the accident. If the horses had not run against the pole they probably would have run into the fence, and caused an injury to life or property. For, as observed by the defendant's counsel, it is impossible to so arrange the surface of a highway that it will be safe for a runaway team to speed upon it. And this court has said that "it is not the duty of towns to provide roads which shall be safe for runaway or unmanageable horses, or such as have escaped from the control of their drivers without the fault of the towns; and where injuries are sustained under such circumstances, it appearing that otherwise they might not have been sustained, the loss must fall upon the owners whose misfortune, if not whose fault, it is that they so happened." *Jackson v. Bellevieu*, 30 Wis. 250, 258. It is stated in the complaint that the highway where this accident occurred was almost perfectly level, with no ditches or rough or uneven places in it, there being nothing within the entire width to prevent a team from passing over it in safety, except the telephone poles set near the fence. These poles could not have been placed nearer the fence without encroaching upon the adjoining property. They seem to have been set with due care, and it is plain that they did not and could not have obstructed or incommoded the public use of the highway. We feel constrained to so hold upon the facts alleged.

The plaintiff's counsel suggests that the question whether the telephone poles incommoded the public use of the highway was one for a jury to determine. That certainly is not the correct view where a question of law is raised by demurrer. It is for the court then to decide whether, the facts being admitted, a cause of action is stated. Of course

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the defendant confessed the facts to be as alleged, but denies that by the law arising on the facts the plaintiff should recover any damages. So here the court must say whether the defendant, by setting its telephone post in the place and manner described, was negligent, or was guilty of a breach of legal duty. We are clearly of the opinion that no actionable negligence is shown. The team could have passed along the highway in safety if the horses had not taken fright at the team coming from behind, and become unmanageable. That the horses ran against or struck the telephone pole was the fault or misfortune of the driver. The demurrer to the complaint should have been sustained.

By the Court.— The order overruling the demurrer is reversed, and the cause is remanded to the circuit court for further proceedings according to law.

JOHNSON, Respondent, vs. BORSON, Appellant.

September 30 — October 14, 1890.

Right of way: Obstructions: Remedy: Right to maintain gate: Court and jury: Appeal from J. P.

1. Where the owner of land obstructs a way over the same to a highway, the person having the right of way may cross the land of the same owner at some other convenient place to reach the highway.
2. The owner of land subject to a right of way to a highway is *held* to have had the right, in order to protect his enclosed land, to maintain a reasonable gate or bar-way at a point practically at the end of the private way — the land between such gate and the highway being unenclosed.
3. The question whether a gate or bar-way across a right of way is an unreasonable obstruction or not, is usually one of fact for the jury.
4. Upon appeal to the circuit court, if there is no trial *de novo*, the verdict of the jury in a justice's court must stand, unless it is clearly unsupported by the evidence.

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APPEAL from the Circuit Court for *Dane* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action was commenced in the municipal court of Dane county to recover damages for an alleged trespass upon the lands of the plaintiff, and for throwing down the bars and fences thereon, by reason whereof the plaintiff's domestic animals escaped from his inclosure and trod down and destroyed the crops growing and being thereon.

The defendant answered that, at the time and place mentioned in the complaint, the defendant had a right of way over the lands described in the complaint, when and where the alleged trespasses were committed; and that the plaintiff, disregarding the right of the defendant to pass along said right of way, "unlawfully obstructed said way by placing therein, at a point about midway between the termini thereof, a bar-way, with large and heavy bars, so large and heavy as to make it unreasonable to require this defendant, and those going over said way to and from his said premises, to take them down and replace them; and that this defendant had no other way of ingress or egress to and from his said land from the highway or any public road; and that, in the exercise of his lawful right, he took down and removed said bars, doing no unnecessary damage to the plaintiff."

By an amended answer the defendant alleged "that, prior to 1886, he (this defendant) was the owner of the premises described in the complaint, also the lands which he still owns, lying north and west of said fourteen-acre tract; that such other lands, lying west and north, are wholly shut out from the highways, and the only way of getting in and out to the highway was over said fourteen-acre tract; that this defendant conveyed said premises, the fourteen-acre tract described in the plaintiff's complaint, to one John Peterson, the plaintiff's grantor, retaining the lands to the north and

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the west, as aforesaid, and still owns and occupies the same, and they are still shut out from all public highways, as aforesaid; that the defendant thereby reserved and retained a right to pass and repass over said fourteen-acre tract to the highway, as of necessity; and that the plaintiff wrongfully obstructed his said right of way; and that this defendant only removed such obstructions, doing no damage."

The case was tried by a jury in the municipal court, and they returned a verdict in favor of the defendant upon all the evidence in the case. The plaintiff appealed from the judgment of the municipal court to the circuit court of Dane county, but made no affidavit so as to entitle himself to a new trial of the whole case in the circuit court. The testimony in the municipal court was taken by a short-hand reporter, and the entire testimony on the trial in the municipal court was certified and returned, with the pleadings and other proceedings, to the circuit court, and the learned judge of the circuit court tried the case upon the evidence so taken on the trial in the municipal court.

Upon the trial in the circuit court, the learned circuit judge made and filed his findings of fact and conclusions of law as follows:

"I find the following facts: (1) I find plaintiff and defendant owners of respective premises, as stated and alleged in the pleadings; (2) that the fourteen-acre piece of land described in the pleadings adjoins the public highway, and lies between it and the land owned and occupied by the defendant, and that the defendant owned said fourteen-acre piece of land, together with the land now occupied by him, prior to the sale by him of said fourteen-acre piece of land to the plaintiff's grantor; (3) that said lands of the defendant are adjacent to no public highways, and defendant has not now, nor has he had since he sold said fourteen-acre piece, any way by which to reach a public highway except

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by crossing said fourteen-acre piece; (4) that by reason of the foregoing the defendant has a right of way by necessity over a portion of plaintiff's premises, that is, over said fourteen-acre piece to the highway; (5) that plaintiff erected and maintained the bars in controversy on the line between the said fourteen-acre piece of land and a 'flat-iron' shaped piece of land, never owned by said defendant or his grantors, which lies adjoining said fourteen-acre piece on the east, and is included in the lands owned by the plaintiff; (6) that the bars were used in connection with a fence on plaintiff's land, and that such use of the premises was a reasonable and proper use, and that they were not an unreasonable obstruction to defendant's use of right of way; (7) that the bars erected and maintained by plaintiff in this case are so located and constructed as to be reasonable and proper in such location and construction, in view of the purpose for which the premises are used by the plaintiff and the use of the right of way by the defendant; (8) that defendant has repeatedly neglected to replace the bars when he removed the same or caused the same to be removed, to the damage of the plaintiff; (9) that across said 'flat-iron' shaped piece of land, on the east of the fourteen-acre piece, the defendant has no right of way, except as plaintiff has given defendant license to travel there, or when, by mutual agreement, defendant's passage to the highway across the fourteen-acre piece has been fenced up; (10) that plaintiff has at various times in previous years, as the proper use of his land demanded it, maintained bars at the same place where they now are, and defendant kept up such bars, as he had occasion to use his right of way, when required to do so by plaintiff.

"From the foregoing I find as conclusions of law (1) that it was the duty of the defendant to keep up and replace said bars as erected and maintained by plaintiff; (2) that the plaintiff has suffered damage by the refusal of the de-

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fendant to so keep up said bars; (3) that the verdict and judgment of the municipal court were not warranted by the law and the evidence; and (4) that the plaintiff is entitled to judgment in this court reversing and setting aside the judgment of said municipal court, with costs, as provided by law. Let judgment enter accordingly. ROBERT G. SIEBECKER, Judge."

The defendant excepted to the 6th, 7th, 9th, and 10th findings of fact, and to the 1st, 2d, 3d, and 4th conclusions of law. The circuit court entered judgment for the plaintiff, reversing the judgment of the municipal court, with costs in favor of the plaintiff, and the defendant appeals to this court.

For the appellant there was a brief signed by *Luse & Wait*, and oral argument by *L. K. Luse*. They argued, among other things, that though there are several adjudged cases holding that the owner of the fee may maintain gates or bars at the termini of the way, none of them support the doctrine that the gates or bars may be placed at any intermediate points across the way. And this court in *Joice v. Conlin*, 72 Wis. 607, intimates quite strongly, if it does not hold, that a gate cannot be maintained across the way except at the termini.

For the respondent there was a brief by *Richmond & Smith*, and oral argument by *J. B. Smith*. To the point that unless the land-owner is restrained by the terms of a conveyance granting a right of way, or unless the right of way is acquired by prescription and no gates have been used during the requisite term, he has the right to erect and maintain suitable gates or bars such as are necessary to the proper and reasonable use of his land, they cited *Bakeman v. Talbot*, 31 N. Y. 366–369; Goddard, Easem. 331; 3 Kent's Comm. 419; *Maxwell v. McAtee*, 9 B. Mon. 20; *Garland v. Furber*, 47 N. H. 301; *Whaley v. Jarrett*, 69 Wis. 613; *Short v. Divine*, 146 Mass. 119; *Huson v. Young*, 4

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Lans. 63. Whether *intermediate* gates or bars may be maintained depends entirely on the terms of the grant, the custom in that particular place, and the reasonableness or necessity of their use.

TAYLOR, J. The only errors alleged by the counsel for the appellant for the reversal of the judgment of the circuit court are: "(1) The court erred in holding that the erection of the bars in question was a reasonable and proper use of the plaintiff's premises, and not an unlawful obstruction to the defendant's right of way. (2) The court erred in holding that it was the duty of the defendant to keep up and replace such bars. (3) The court erred in holding that the verdict and judgment of the municipal court were not warranted by the law and the evidence."

The finding by the circuit court that the defendant had a right of way by necessity over plaintiff's fourteen-acre piece to the highway, must be taken as established by the evidence in the case, as neither party has excepted to such finding of fact. For the purposes of this appeal, that must be taken as a verity.

The ninth finding of fact, in view of the undisputed evidence in the case, also establishes the fact that at the time of the alleged trespass the defendant had a right of way across the triangular piece of land lying between the fourteen-acre piece and the highway, as the evidence clearly shows that the plaintiff had fenced the fourteen acres from the highway, except at the point where the bar-way led from said fourteen-acre tract across the triangular piece to the highway. The plaintiff having obstructed the defendant's way of necessity to the highway across the east side of said fourteen-acre tract, south to the highway, he might of right cross the plaintiff's land at some convenient place to reach such highway. This proposition is sustained by the following decisions in this court: *Jarstadt v. Smith*, 51

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Wis. 96, 98, and cases cited in the opinion in that case. See, also, *Dillman v. Hoffman*, 38 Wis. 559.

It having been established that the defendant had a right of way over the place where the bar-way was placed by the plaintiff, the only other material questions in the case are as to the right of the plaintiff to maintain a bar-way at that place, and, if he had that right, then whether the bar-way was a reasonable one under all the evidence in the case. Under the evidence in the case, we think the maintaining by the plaintiff of a gate or bar-way at the place in controversy would not be an unwarrantable obstruction of the way, as the evidence shows that the bar-way was practically at the end of the private way. The evidence seems to show that the land between the bar-way and the highway was unenclosed, and so the protection of the plaintiff's enclosed land would justify a gate or bars at the place mentioned.

The only other queston is, Was this bar-way a reasonable, or was it an unreasonable, obstruction of the defendant's right of way? It will be seen that the defendant, as a justification for leaving the said bars open when he passed through the same, claims that they were unreasonably heavy, and consequently the obstruction of the way was an unreasonable obstruction. We must presume that this question of the reasonableness of the bar-way was a question litigated in the municipal court; and an examination of the evidence taken on the trial in that court shows very clearly that the question of the reasonableness of the obstruction was contested on such trial. The jury in the municipal court, having found a verdict for the defendant, must have found that the obstruction was an unreasonable one. They must have found, as the circuit court did, that the *locus in quo* was the private way of the defendant; and, if the law be as it is claimed by the plaintiff to be, that in the absence of any express agreement on the subject the owner of the soil may place such reasonable gate or bars across such

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right of way as is fairly necessary to protect the crops and cultivated lands of such owner, then the jury must also have found the bars in question were an unreasonable obstruction. That the reasonableness or unreasonableness of the obstruction is a question of fact for the jury in almost all cases cannot be controverted. See *Bakeman v. Talbot*, 31 N. Y. 366; *Baker v. Frick*, 45 Md. 343; *Huson v. Young*, 4 Lans. 63; *Brill v. Brill*, 108 N. Y. 511; *Whaley v. Jarrett*, 69 Wis. 613; Washb. Easem. 256.

The jury having found for the defendant upon this question, their verdict on that question must stand, unless it is clearly unsupported by the evidence. That there is sufficient evidence to support their finding that the bars were an unreasonable obstruction can hardly be controverted. Under the rule established by this court as to the power of the circuit court to reverse the judgment of a justice's court upon questions of fact, it seems to us very clear that the learned circuit judge erred in reversing the judgment of the municipal court upon that question. See *Stebbins v. Killeen*, 68 Wis. 682; *Campbell v. Babbitts*, 53 Wis. 276. The jurisdiction of the municipal court in the trial of civil actions is the same as that of a justice's court, except that it may try cases where title to real estate comes in question. There certainly was sufficient evidence to sustain the verdict of the jury, and that is sufficient to make their finding binding upon the circuit court upon appeal. We are clearly of the opinion that the circuit court erred in reversing the judgment of the municipal court upon the reasonableness of the obstruction placed in the right of way by the plaintiff.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to that court to affirm the judgment of the municipal court.

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THE STATE EX REL. BRIESEN, Respondent, vs. BARDEN, Appellant.

September 30 — October 14, 1890.

Elections: Constitutional law: Printing on back of ballots.

The ballots for judicial officers and those for other officers elected on the same day being required by sec. 89, R. S., to be put into separate boxes, ballots having the word "*Judiciary*" printed on the back thereof are not void under sec. 3, art. III, Const. (which provides that "all votes shall be given by ballot"), nor under sec. 10, ch. 464, Laws of 1885 (which makes it an offense to print or circulate printed ballots having any "printing, engraving, device, or mark of any kind upon the back thereof").

APPEAL from the Circuit Court for *Columbia* County. The facts are stated in the opinion.

Thos. Armstrong, Jr., and *G. W. Hazelton*, for the appellant, argued, among other things, that a ballot is merely a written vote in contradistinction to one *viva voce*, and as used in the constitution the word has its common-law meaning — nothing more nor less. It has never been held, in the absence of a statute, that a mark or word on the outside of a ballot vitiated and destroyed it. Cush. Leg. Assem. sec. 103; Mechem, Pub. Off. sec. 191; *State ex rel. Millican v. Phillips*, 63 Tex. 390. Courts have uniformly been governed by the intention of the voter, in considering whether to count or reject irregular ballots, without regard to what might be on the outside of the ticket or how they might have been folded. *State ex rel. Spaulding v. Elwood*, 12 Wis. 551; *Att'y Gen. ex rel. Carpenter v. Ely*, 4 id. 430; *People v. Cook*, 8 N. Y. 67; *Hawes v. Miller*, 56 Iowa, 395; R. S. secs. 34, 70. A secret ballot does not mean a ballot which necessarily shields every vote cast at an election from publicity. The "vote by ballot" does nothing more than to provide a method by which the voter who desires to conceal the contents of his ballot may do so. No case

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can be found where a court has held that a secret ballot is anything more than a personal privilege. *State ex rel. Hopkins v. Olin*, 23 Wis. 309; *People ex rel. Williams v. Cicott*, 16 Mich. 283; *Temple v. Mead*, 4 Vt. 535; Cooley, Const. Lim. 760. This being so, the complaint is fatally defective in not alleging that the voters who supported the defendant were prevented from voting a secret ballot by reason of the distribution and use of the tickets in question.

Sec. 10, ch. 464, Laws of 1885, was intended to secure practical uniformity in the ballots by prohibiting the printing and circulation on election day of any ballots except those described in the statute. It was not intended to place restrictions upon the voter, or to make ballots of any other description illegal and void when voted by qualified electors and received by the inspectors. Had that been the intention, the law would have so declared. The section is borrowed from older states, but with a significant alteration. As found in Indiana, Texas, Mississippi, and elsewhere, it provides that "the inspectors shall refuse all ballots of any other description." In some of the states the language is, "the inspectors shall refuse to receive or count ballots not in conformity with this section." The omission of this provision from our statute must have been for a purpose. Again, sec. 9 of the same act forbids the inspectors to expose or examine the backs of ballots actually cast, and requires them to count and canvass all such ballots and declare or announce the result. *Kellogg v. Hickman*, 12 Col. 256, is the only authority we have found under a statute like our own. Other cases are based upon statutes which forbid the inspector to receive and count the vote. *Comm. v. Woelper*, 3 Serg. & R. 29; *Druliner v. State*, 29 Ind. 308; *Napier v. Mayhew*, 35 id. 276; Mechem, Pub. Off. sec. 193.

There is no analogy between contracts which are made in violation of law, and ballots which are forbidden to be printed or circulated but not forbidden to be voted.

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George W. Bird, for the respondent, contended, *inter alia*, that the ballots cast for the defendant were void because in violation of sec. 3, art. III, Const., which provides that "all votes shall be given by ballot," etc. A ballot implies absolute and inviolable secrecy. Bouvier's Law Dict. 11th ed. and 15th ed.; McCrary, Elections, sec. 513; Paine, Elections, sec. 535; Cooley, Torts, 298; Cooley, Const. Lim. (5th ed.), 760, 761; 2 Am. Cyc. 245, "BALLOT;" Mechem, Pub. Off. secs. 192, 194; 1 May, Const. Hist. of Eng. 353; *Temple v. Mead*, 4 Vt. 535; *People ex rel. Smith v. Pease*, 27 N. Y. 45; *Williams v. Stein*, 38 Ind. 89; *State ex rel. Williams v. Cicott*, 16 Mich. 283; *Brisbin v. Cleary*, 26 Minn. 107; *Barnum v. Gilman*, 27 id. 466. If the ticket be not such as required by the constitution, or even a statute, it is void and cannot be counted. *Comm. v. Read*, Bright. Elec. Cas. 126; *S. C.* 2 Ashm. (Pa.), 261; *Foster v. Scarff*, 15 Ohio St. 532; *Att'y Gen. v. Detroit Comm. Council*, 58 Mich. 213, 217; *Jones v. Glidewell*, 7 Law Rep. Ann. 831; Cooley, Const. Lim. 760; Mechem, Pub. Off. sec. 192.

The ballots cast for the defendant were void because in violation of sec. 10, ch. 464, Laws of 1885 (sec. 44*i*, S. & B. Ann. Stats.). Whatever is prohibited by statute is, of course, illegal and void. *Ætna Ins. Co. v. Harvey*, 11 Wis. 394; *Lemon v. Grosskopf*, 22 id. 447; *Melchoir v. McCarthy*, 31 id. 252; *Clarke v. Lincoln Lumber Co.* 59 id. 655; *Fulton v. Day*, 63 id. 112; *Hallett v. Novion*, 14 Johns. 273. The object of the statute being to secure the secrecy of the ballot, any departure from its provisions in any way destroying, invading, or impairing that secrecy invalidated the ballot itself and required its rejection. McCrary, Elections, secs. 500–505; Cooley, Const. Lim. 760; Cooley, Torts, 298; *Comm. v. Woelper*, 3 Serg. & R. 29; *State ex rel. Mahoney v. McKinnon*, 8 Oreg. 493; *Ledbetter v. Hall*, 62 Mo. 422; *Oglesby v. Sigman*, 58 Miss. 502; *Perkins v. Carraway*, 59 id. 222; *Keller v. Toulme*, 7 S. Rep. (Miss.), 508; *Steele v.*

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Calhoun, 61 Miss. 556; *Kirk v. Rhoads*, 46 Cal. 398; *Reynolds v. Snow*, 67 id. 497; *State v. Collins*, 12 Atl. Rep. (R. I.), 121; Paine, Elections, secs. 534–5. In cases where the particular objections urged were held not to invalidate the tickets, those objections were either as to the heading or other printing on the *inside* of the tickets, or their shape where there was no requirement as to the shape. *Drulinner v. State*, 29 Ind. 308; *Stanley v. Manly*, 35 id. 275; *Millholland v. Bryant*, 39 id. 363; *State ex rel. Julian v. Adams*, 65 id. 393; *State ex rel. Millican v. Phillips*, 63 Tex. 390; *Owens v. State ex rel. Jennett*, 64 id. 500; *Williams v. State ex rel. Vasmer*, 69 id. 368; *Wyman v. Lemon*, 51 Cal. 273; *Coffey v. Edmonds*, 58 id. 521.

ORTON, J. The demurrer *ore tenus*, or the defendant's objection to any evidence under the complaint, on the ground that it does not state facts sufficient to entitle the relator to recover, by stipulation stood as a general demurrer on the same ground, and as such was overruled, and the defendant has appealed to this court from said order.

This is a proceeding in *quo warranto* to inquire by what right the defendant holds and exercises the office of county judge of the county of Columbia in this state. The complaint states, in substance, that at an election held in the several election districts in said county on the first Tuesday, it being the 2d day, of April, 1889, for the office of county judge in said county, for the term of four years commencing on the first Monday of January, 1890, the said relator, *E. V. Briesen*, and the said defendant, *Levi W. Barden*, both residents and qualified electors of said county, and eligible to hold said office, were the opposing and only candidates for said office, and at said election the said *Briesen* received 1,413 votes, and the said *Barden* received 2,565 votes, but all of the votes so cast for said *Barden* were ballots on the back of which was printed the word "Judiciary"

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in such manner that they could not be folded without disclosing said word. The said *Barden* knowingly and purposely printed or caused to be printed the said ballots for use at said election, and distributed or caused to be distributed in and through the several election districts of said county, and at the polls thereof at said election, the said votes or ballots, and knowingly and purposely used and voted or caused the same to be used and voted at said election, to the number of 2,565 aforesaid, which constituted all the votes the said *Barden* received at said election for said office, or cast at said election, and all with the said word so printed on the backs thereof. The face of all the ballots so cast and received by the said *Barden* contained the following: "For associate justice of the supreme court, John B. Cassoday. For county judge, *Levi W. Barden.*" In about the middle of the back thereof was printed, in common type, "Judiciary." The votes at said election for said office were duly canvassed, and the said *Barden* received the certificate of election to said office, and entered upon the duties thereof on the first Monday, it being the 6th day, of January, 1890, and has remained in said office. The names of the persons who voted said ballots are not known. The relator was duly elected to said office, and has since duly qualified to enter on the duties thereof.

The only question on the demurrer was whether the said ballots so cast for the defendant, *Barden*, with such an indorsement thereon, were lawful and valid ballots. The learned counsel of the relator made a very able argument, and cited many authorities to show that said ballots were void (1) by the constitution, and (2) by the statute. The learned counsel of the defendant, with equal ability, contended that they were valid, and properly voted, counted, and canvassed for the defendant.

The learned counsel of the relator correctly contends that the question is, Which of the two received a majority of

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the *legal* votes for said office, cast at such election? *State ex rel. Holden v. Tierney*, 23 Wis. 430. The main contention of the learned counsel is that the constitution, art. III, sec. 3, requires that "all votes shall be given by ballot," and that all of the votes so attempted to be cast for the defendant were void because not given by *ballot;* that the printed word "Judiciary" on the back of the same destroyed their character as ballots, and correctly contends that the inherent and distinctive character of a ballot is its *secrecy*, as against a vote *viva voce*, or an open or declared vote. That secrecy so essential to a vote by ballot may have been so required by the constitution of this and other states for reasons personal to the voter as a privilege, or on grounds of public policy, or both, but the true reason is not very material. The absolute secrecy of the vote is required, and to secure that it must be by ballot. A so-called ballot that does not secure the secrecy of the vote is not a ballot in the sense of the constitution and laws of this state.

What does such secrecy mean? In what respect? And what does it consist of? A vote is the wish or will of an elector, whether expressed by ballot or *viva voce*. That wish or will expressed by a ballot must not be known to any one except the voter himself, by such ballot. The paper called a ballot must not disclose for what or for whom it is voted, except by the name of the person voted for and the office on the face thereof. If it has any mark or device on the outside, and visible or apparent to common or casual observation, that discloses for what or for whom it is voted, it is not a ballot. This I understand to be the strict meaning of a constitutional ballot; but this construction of the constitutional requirement must be reasonable. It would almost seem that whatever mark there might be on the ballot by which it might possibly be known how the elector voted, to invalidate it, ought to have been placed there by

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design, and not by mere *accident*. The rule that anything on the ballot by which it might be possible to ascertain the will or wish of the voter invalidates it, is too strict to be practical. The quality of the paper, the dimensions or form of the ballot, the water-marks in the paper, the manner of folding it, or any other like differences that the ballots of either candidate may have by which it might be possible to determine for whom or for what they are cast, ought not to destroy their validity. It would be hardly possible without concert that the tickets on both sides should be exactly alike. Such mere accidental differences would be likely to occur more or less in all cases, and voting by ballot would be impracticable, if not impossible, without them. Anything written or printed on the outside of a ballot, to make the voting of it possible or practicable, and not placed there for the purpose of making it known for whom the elector votes, and not necessarily or commonly used for such purpose, would seem to come within the same rule of reasonable construction.

Judicial elections are required to be held on the day of the town election when the town officers, or, if in the cities, the city officers, are elected, and the votes for both are received at the same time. The statute (sec. 89, R. S.) requires that "all votes given for any [judicial] officer shall be put in a ballot-box separate from that used for any other election on the same day." How can this be made practicable? The election officers are ready to receive the ballots for town officers and for any judicial officers to be then elected. If a ballot is offered, how can they tell what ballot it is, whether *town* or *judicial*. The same elector votes for both at the same time. Must they ask the voter whether it is a judicial or a town ticket? If he answers, "It is a judiciary ticket," as he must in order to have it put into such separate box, has he disclosed any important secret that may indicate how or for whom he votes? Evidently not. Many electors would not

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know exactly what to call such a ticket if asked by the inspector. It would take time to explain it after such inquiry. Is that practicable? All the possible real harm is done in disclosing it in this way. Would it not be the better way, and answer the same purpose, if the word "Judiciary" is placed on that class of tickets, by which the inspector may know at a glance in what ballot-box to deposit it? Is not this the only reasonable and practicable way of informing the officer in what box to deposit it? Would that word, printed boldly and legibly on a ballot at such an election, disclose any secret that is essential to the validity of the ballot? It does not indicate how or for whom the elector votes, and such is not the purpose. It would seem that all ballots for judicial officers ought to be distinguished in that way from town election ballots. It would be equally convenient to have the word "Town" printed on the town ballots, as they also must be deposited in a separate box. This practice would be reasonable and proper to enable the election officers to comply with the statute requiring the ballots to be put into separate boxes. We do not know from this case that such is the practice, except in this instance, but it certainly ought to be, if it is not unconstitutional or unlawful. We do not know that such is not the practice in such cases, and we do not know that the word "Judiciary" was placed on these ballots according to the general custom and practice. It would seem, then, that it would be reasonable and proper that such ballots should be so distinguished. It follows that it would not vitiate or invalidate the ballot as a ballot to so distinguish the judiciary vote.

But it may be answered that, in this instance, only the defendant's ballots were so distinguished, and therefore any one could know that the elector, if he cast such a ballot with that word on it, voted for the defendant and not the relator, and thus the mischief is accomplished. That shows that it is not the ballot itself that is at fault, but the use

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that is made of it in this instance and under these circumstances. It so happened in this instance that the ballots of the relator did not have this word on them. Any one could therefore know just as well how the elector voted by such ballots, and know that he voted for the relator. The ballots of the relator disclosed the secret guarded by the constitution, just as much as those of the defendant. If the votes on one side should be declared void for such reason, they should be declared void on both sides. It is not in the ballot itself *per se* or *ipso facto*, but in the use of it under the circumstances, that the evil existed. It is the substance of things to be considered on a constitutional question, as on any other. The same evil or mischief is wrought in the voter telling the inspector *orally* in what box to put his ticket, as if the word "Judiciary" was on it.

From practical necessity, then, we say that it was proper and constitutional to print on the defendant's ballots the word "Judiciary," and for the electors to vote them. It was for the high and wise purpose of not having judicial officers and candidates for such offices exposed to the feeling and excitements of political, popular, and general elections that the constitution has provided that such elections should not be held at any general election. Art. VII, sec. 9. To save the great expense of special elections, the legislature provided that they should be held on the same day of *town* elections. To carry out both the constitution and the statute, it is necessary that there should be separate ballot-boxes, and that the votes for judicial officers should be put in a ballot-box separate from that used for town officers on the same day. It is therefore necessary that there should be something on the ballot to indicate to the election officers in which ballot-box to deposit the vote, if in itself it does not indicate how the elector votes.

It is very clear that the statute (sec. 10, ch. 464, Laws of 1885) making it an offense for any person to print any bal-

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lot for use at any election, or distribute or circulate at any such election, any printed ballot having any printing, engraving, device, or mark of any kind, upon the back thereof, ought to have the same construction as the constitutional provision, in respect to the word "Judiciary" printed on judicial ballots. The law making this necessary is not affected or repealed by this statute, and this necessary practice under it is not in conflict with this statute. It is not certain that this statute ought not to be so construed as to embrace only such printing, engraving, device, or mark that in itself indicates, or may be naturally used or intended to indicate, how an elector votes at an election; but this statute does not prohibit the voting such a ballot, or declare the vote itself illegal. Besides this, such votes, if any, must be counted, for the inspector is forbidden to examine the backs of the ballots; and, when counted and canvassed, they are by law to be destroyed. They cannot therefore be void votes. The above views are only applicable to judicial elections, with such a direction as to the ballot-box into which the vote should be deposited. Where there is so much necessity and propriety for such a designation, and it may be customary, are we to presume that the electors knew or observed that all the ballots cast for judges at that election were not distinguished or marked in the same way, or that the presence or absence of such a designation indicated who were voted for? To avoid any such improper use of such a designation, all such ballots may be made uniform in that respect.

This case may well stand as an exception to the rule that no mark of any kind must be placed on the backs of ballots to be voted at any election, from the peculiarity and necessity of the case. In all other cases, the law may well stand as contended by the learned counsel of the relator, and approved by the authorities he has cited. None of such authorities militate against the view we have above

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taken; for in no case has there been the necessity to so distinguish the ballots to be deposited in separate boxes, under a provision of the constitution requiring a judicial election to be held on a different day from that of the general election. These two constitutional provisions may well stand together.

It follows from the above views that the complaint does not state a cause of action, because it appears therefrom that the defendant received a majority of the legal votes cast at said election, and is entitled to the office as against the relator.

By the Court.— The order of the circuit court is reversed, and the cause remanded with direction to sustain said demurrer, and for further proceedings according to law.

RYAN, Respondent, vs. THE ROCKFORD INSURANCE COMPANY, Appellant.

October 1 — October 14, 1890.

Practice: Special verdict: Instructions to jury.

1. Where particular questions of fact are submitted to the jury, they should not be instructed as to what answers thereto would be consistent, and what inconsistent, with a general verdict in favor of one or the other party.
2. The jury returned a general verdict for the plaintiff and an answer to one of three particular questions submitted. These were accepted and retained by the judge, who thereupon changed the form of one of the unanswered questions and, without giving any further instructions, sent the jury out again to answer those questions. The jury had previously been instructed that an affirmative answer to those questions would be consistent with the general verdict. They returned an affirmative answer to one of the questions and a verbal statement which, on consultation with the judge, was finally agreed upon as the proper answer to the other. These proceedings were had in the absence of defendant's attorney. *Held*, error.
3. Separate parts of a verdict should not be determined and returned at different times.

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APPEAL from the Circuit Court for *Dane* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an action upon a policy of fire insurance, covering a dwelling-house and barn and the contents, situated upon the premises occupied by the plaintiff in the town of Dunn. The policy was dated June 15, 1888, and contains a provision to the effect that the same would be void unless the plaintiff was the sole and unconditional owner of the premises. The defense say, among other things, that the plaintiff was not such owner. It is conceded that the premises were conveyed to Ellen Ryan, then wife of plaintiff, on April 24, 1884, and that she died September 21, 1884. The plaintiff claims to have proved title in himself by the record of a deed of the premises from Ellen Ryan to himself, dated April 24, 1884, and recorded in the register's office July 13, 1888, but which original deed had been destroyed in the fire. The defense claimed, and gave evidence upon the trial tending to prove, that the blank upon which said deed was written and so recorded contained upon its upper right-hand corner these words, to wit: "M. J. Cantwell, Law-Blank Publisher, Madison, Wis.;" and that no such blanks ever existed until after April, 1887, nearly three years after the death of the grantor named in said deed.

At the close of the testimony, the plaintiff's counsel requested the court to submit to the jury the following question, which, for convenience, is hereby designated "Question A," to wit: "Did Ellen Ryan, on the 24th day of April, 1884, execute a deed to *Phil E. Ryan*, conveying to him the real estate upon which the property insured was situated at the time the policy was issued to him by the *Rockford Insurance Company?*" The court submitted the said question to the jury with the following remarks, to wit: "If you answer that question 'Yes,' it would be in accordance and consistent rather with a general verdict for the plaintiff.

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If you answer it 'No,' it would be inconsistent with a general verdict for the plaintiff. You can see you will answer that question 'Yes' or 'No.'" Thereupon the counsel for the defendant asked the court to submit to the jury the following question, to wit: "(1) Did the blank upon which the deed in question, purporting to convey the premises from Ellen Ryan to *Phil E. Ryan*, was written, contain upon the upper right-hand corner, upon the line near the top margin on the deed, the words: 'M. J. Cantwell, Law-Blank Publisher, Madison, Wis.'?" The court submitted that question to the jury, with the following remark: "If you have understood the instructions which I have given you, the answer to that question, one way or the other, would not necessarily alone determine your verdict; and if you should say 'Yes,' and then say 'Yes' in answer to this next question, to wit, '(2) If you find that the deed in question did contain such words, do you further find that the deeds containing such words upon the upper right-hand corner were [not] in existence upon the 24th day of April, 1884?'"— which last question was submitted with the following remark: "If you answer both those questions favorably to the defendant, it would be consistent with a general verdict for the defendant, and inconsistent, gentlemen, with any other."

The court thereupon charged the jury generally, and, after such charge, they retired to deliberate over their verdict, about 5 o'clock in the afternoon of November 30, 1889, and continued such deliberation until 9:40 P. M., when they returned into court with a general verdict in favor of the plaintiff, and assessing his damages at $1,896.44, and at the same time with an answer "Yes" to said question A propounded by the plaintiff's counsel, and both said general verdict and said answer and question A were thereupon handed to the judge and laid by him on his desk. The court thereupon informed the jury that they had not answered questions 1 and 2 propounded by defendant's coun-

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sel. The foreman thereupon replied that he did not suppose it was necessary since they had answered said question A. The court replied to the effect that it was necessary to answer the first question propounded by the defendant's counsel; that, if they answered that question "No," it would not be necessary to answer No. 2; but if they answered that question "Yes," then it would be necessary to answer No. 2. The general verdict and answer to said question A remained lying on the court's table all this time, and until the jury finally returned into court with answers to questions 1 and 2 propounded by defendant's counsel. The court thereupon amended said second question by striking out the word "not." The jury then retired again, and, after an absence of one hour and twenty minutes, returned into court with an answer "Yes" to the first question propounded by the defendant's counsel, and the foreman then and there stated to the court that they had found, as an answer to the second question submitted by the defendant's counsel, the following, to wit: "That there was this one deed in existence on the 24th day of April, 1884, or the blank on which it was written, with those words upon the upper right-hand corner." The court thereupon asked the jury if he should write the answer to the said question in that way, and they answered "Yes." The same was thereupon written accordingly, and the court received all of said answers and said general verdict as the verdict in said cause, and thereupon discharged the jury. Everything that took place between the court and the jury, as above stated, subsequent to the time that they first retired,—about 5 o'clock in the afternoon,—was in the absence of the defendant's counsel, and without any notification to such counsel to be present.

The defendant thereupon moved the court, upon its minutes, to set aside said general verdict and findings and for a new trial for several reasons; among others, as being

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against the evidence, and against the law and evidence, and contrary to the instructions of the court, and for the several things that occurred in relation to the findings and verdict in the absence of defendant's counsel as stated, because the jury had failed to answer the second question propounded by the defendant's counsel, and because the answers were evasive and unwarranted, and the findings of the jury inconsistent. The motion was overruled, and judgment was thereupon ordered upon said verdict and findings in favor of the plaintiff. From the judgment entered thereon, the defendant appeals.

H. W. Chynoweth, for the appellant.

For the respondent there was a brief by *Bashford & O'Connor*, and oral argument by *R. M. Bashford.*

CASSODAY, J. The learned counsel for the defendant strenuously contends that the evidence is insufficient to support the general verdict or any of the special findings in favor of the plaintiff. The view we have taken of the case renders it unnecessary for us to determine that question.

The statute requires the court to direct the jury to find a special verdict when requested as prescribed. Sec. 2858, R. S. Such verdict must "be prepared by the court in the form of questions in writing, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact *to be stated as aforesaid.*" *Ibid.* This last provision is applicable to the case at bar. The purpose of thus submitting particular controverted questions of fact is to secure a direct answer free from any bias or prejudice in favor of or against either party. It is a wise provision in certain cases when properly administered. It has often been demonstrated in the trial of causes that the non-expert juryman is more liable than

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the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice; and hence it is common practice for courts, in the submission of such particular questions and special verdicts, to charge the jury, in effect, that they have nothing to do with, and must not consider the effect which their answers may have upon, the controversy or the parties. The learned trial judge, when in health, has frequently so charged. It is certainly a very proper thing to do when the business or reputation of either party is such as to naturally stimulate a bias in favor of the one party or the other. It is true that juries, under such a charge, sometimes return inconsistent answers; but it is usually because such is the honest result of their unbiased judgment upon different branches of the evidence.

In the case at bar the learned trial judge seems to have been particularly anxious to prevent such inconsistent answers; and hence he explained to the jury what different answers to each particular question so submitted would be consistent, and what inconsistent, with a general verdict in favor of one or the other party. This was peculiarly calculated to secure special answers which would be consistent with a general verdict rather than in accordance with the weight of evidence upon each of such particular questions. The effect of such instructions was very much the same as though the court had charged the jury that after they had determined upon a general verdict then they should answer the particular questions submitted in the way they had thus been informed would be consistent with such general verdict. This was misleading, and well calculated to defeat the very object of the statute in authorizing such submission.

But this error was aggravated by what subsequently occurred, as indicated in the foregoing statement. After

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being out about five hours, the jury returned a general verdict in favor of the plaintiff, and an affirmative answer to question A submitted at the request of the plaintiff, but without answering either of the questions requested by the defendant. In the absence of any counsel on the part of the defendant, the court then informed the jury, in effect, that it would be necessary for them to answer the two questions submitted at the request of the defendant, and thereupon erased the word "not" from the second of those questions. The jury thereupon retired again to consider said two questions so requested by the defendant, and nothing more,—the court in the mean time having accepted and retained the general verdict and question A and the answer to it,—both having been returned in favor of the plaintiff. By thus retaining the general verdict and question A and the answer to it, and sending the jury out to consider the two unanswered questions merely, under the instructions which had previously been given as to the way in which such questions should be answered in order to make the same consistent with the general verdict, they had but one thing to do, and that was to return answers which would be thus consistent with the general verdict. But the jury manifestly had trouble in reaching such conclusion, under the evidence, as they were absent an hour and twenty minutes before reaching any conclusion, and then returned with an affirmative answer to the first of those questions, and a long verbal statement in lieu of a written answer to the second, which, on consultation with the court, was finally agreed upon as the proper answer to the second question, notwithstanding they had previously been instructed to answer that question in the affirmative, in case they answered the first in the affirmative. But, as indicated, the second question had in the mean time been changed by the court, striking out the word "not," and no instruction had been given upon that question so modified.

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The learned counsel for the plaintiff claims that these questions were immaterial, but the learned trial judge manifestly did not think so, for upon the point involved he expressly charged the jury: "Now, that is a sharp question drawn out again, gentlemen, dividing these parties, and it is submitted to you to find as you believe the truth is upon it."

A verdict is a declaration of the truth as to the matters of fact submitted to the jury. However many questions it may have determined, yet it should be returned as a whole unit. From its very nature, separate parts of it should not be determined and returned at different times and in separate fractions. There was manifestly a mistrial.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SHEANON, Respondent, vs. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, Appellant.

October 1 — October 14, 1890.

Accident insurance: "Loss of two entire feet."

An insurance policy provided that the principal sum should be paid if the insured, from a violent and accidental injury which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot." The insured was accidentally shot in the back, the bullet penetrating his spine and producing immediate and total paralysis of the lower part of his body, and entirely destroying the use of both feet. *Held*, that he had suffered "the loss of two entire feet," within the meaning of the policy.

APPEAL from the Circuit Court for *Dane* County.

Action upon a policy of insurance against accident. The defendant appeals from an order overruling a general de-

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murrer to the complaint. The facts stated in the complaint will sufficiently appear from the opinion.

For the appellant there was a brief by *Ogden & Hunter*, and oral argument by *L. M. Ogden.*

H. W. Chynoweth, for the respondent, as to the construction given the words, "total loss" and "wholly destroyed," in analogous cases, cited *Carr v. Providence W. Ins. Co.* 38 Hun, 86; *Levy v. Merchants' M. Ins. Co.* 52 L. T. 263; *O'Leary v. Stymest*, 6 Allen (N. B.), 289; *Snow v. Union M. M. Ins. Co.* 119 Mass. 592; *Livermore v. Newburyport M. Ins. Co.* 1 id. 278; *Insurance Co. v. Fogarty*, 19 Wall. 640; Bouvier, Law Dict.; Anderson, Law Dict.; *Oshkosh P. & P. Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 200; *Williams v. Hartford Ins. Co.* 54 Cal. 442; *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 67; *Harriman v. Queen Ins. Co.* 49 id. 85.

Cole, C. J. It is almost superfluous to say that the construction of a policy of life or accident insurance is governed by the same rules as those which are applicable to the construction of other written contracts; that is, they should be construed according to the sense and meaning of the language used, in order to carry out the intention of the parties to the contract, when ascertained. And it is doubtless true that, in arriving at the intention of the parties, the language is to be understood in its ordinary and popular sense, unless it appears that it was used in some special or peculiar sense. There can be no disagreement as to the application of these cardinal and familiar rules in the construction of such contracts as the one before us.

Now, in view of these rules, what conclusion must be reached upon the facts stated in the complaint? It appears that the plaintiff was shot in the back, during the life of the policy, while he was attempting to escape from a saloon quarrel commenced by other parties; and the ball penetrated his spine, and produced an immediate and total

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paralysis of the lower part of his body, and entirely destroyed the use of both feet. The quarrel in the saloon arose suddenly, and was carried on without any participation therein by the plaintiff, and without his fault. He happened to be in the saloon when it occurred, and seems to have used due caution for his personal safety and protection; but he was shot in the back, probably accidentally, by one of the parties engaged in the quarrel. The question is, Does the policy cover such an injury? The policy covers both death and indemnity; the company agreeing to pay the principal sum if the insured, from a violent and accidental injury which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot." This is the language of the policy, and the question is, What does it mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury must have destroyed the entire use of his legs and feet so that they will perform no function whatever?

The contention of the learned counsel for the defendant is that the clause is to be understood in the former sense, and implies an amputation or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the or-

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dinary sense attached to the word when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. The expression "loss of feet" would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered "a loss of two entire feet," within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language, as here used, to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body. It is not necessary to go into any recondite or elaborate discussion of the language of the policy, but only to give it its ordinary and popular sense. And, understanding it in that sense, we are very clear that the complaint states a cause of action, and that the demurrer was properly overruled.

By the Court.— The order of the circuit court is affirmed, and the cause remanded for further proceedings.

KALBUS, Respondent, vs. ABBOT and another, Trustees, Appellants.

October 1 — October 14, 1890.

RAILROADS: *Negligence: Frightening horses at street crossing.* (*1, 2*) *Evidence: Character of team: Immaterial error.* (*3*) *Special verdict.* (*4*) *Contributory negligence: Instructions.* (*5*) *Management of train: Court and jury.*

1. In an action to recover for personal injuries caused by plaintiff's horses being frightened by a locomotive and running away, a witness who owned the horses about a year before the accident was

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properly allowed to testify as to whether they were gentle or wild when he owned them.

2. The fact that the plaintiff was allowed to testify that no one had ever warned him about this team, is *held* not sufficient ground for a reversal of the judgment in his favor.
3. Where the questions submitted for a special verdict covered the whole case, it was not error to refuse to submit other questions, the answers to which would not have been conclusive either way.
4. An instruction that "the fact that this team may have once before run away, or was easily frightened, was not contributory negligence on the part of the plaintiff unless the jury find that a person of ordinary care and prudence would not drive such a team over this railroad crossing under all the circumstances in this case,"— is *held* sufficiently favorable to defendants.
5. The evidence in this case — tending to show, among other things, that after a street in a city had been blocked for ten or fifteen minutes by defendants' train, and a number of teams, including the plaintiff's, had gathered, waiting to cross, the train was backed off the street, and the engine became hidden from the plaintiff by a building; that the defendants' flagman at once signaled to plaintiff to cross, but before he could pass the tracks the engine returned into the street, blowing off steam and making a great noise; and that plaintiff's horses were frightened thereby and ran away, causing the injuries complained of — is *held* to sustain a finding by the jury that defendants' servants were guilty of negligence.

APPEAL from the Circuit Court for *Winnebago* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This is an action to recover damages for a personal injury which the plaintiff claims was caused by the negligence of the defendants. The defendants were operating a railroad running through the city of Oshkosh, at and before the time the plaintiff was injured. The plaintiff sustained the injury complained of in attempting to cross the tracks of the defendants' railroad where they cross Jackson street, one of the public streets of said city. The facts are substantially as follows: On the day the injury occurred, the plaintiff was driving a team of horses attached to an empty stone wagon on Jackson street in said city. As he approached from the north the place where the railroad

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tracks crossed that street, a train of the defendants' cars obstructed the street. Plaintiff stopped his team on the north side of the crossing, and waited until the train moved from the street along which he was driving, the train moving to the east or northeast, and, as soon as the train with engine attached had backed out of the street, a flagman of the defendants stationed at this crossing indicated to the plaintiff that the way was clear for him to pass. The plaintiff started his team immediately, and moved towards the track. When he reached the track the engine attached to the train that had obstructed the way moved forward towards the crossing and near to the plaintiff's horses. The horses became frightened and unmanageable, and ran away, and threw the plaintiff from the wagon and broke his leg. These facts are undisputed, except that the testimony of the defendant tends to show that the engine was at least seventy-five feet east of the crossing when the plaintiff's horses became frightened and unmanageable, and was backing away from the street, instead of towards the street as claimed by the witnesses on the part of the plaintiff.

The testimony on the part of the plaintiff shows that plaintiff stopped his team within about thirty feet north of the railroad track when he approached the crossing on Jackson street. The street was then blocked, and, after waiting about ten or fifteen minutes, the engine and cars moved northeasterly off Jackson street, and behind a blacksmith shop which stood on the corner of Jackson street and northerly from and near the railroad tracks. The engine was at the west end of the train, and backed the cars easterly across Jackson street, and as soon as the engine had backed from the street it was hidden from the view of the plaintiff by the blacksmith shop; and the flagman of the defendants, standing on the south side of the tracks and in full view of the engine, signaled the plaintiff to come across the tracks.

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The plaintiff started immediately upon receiving the signal, and when his team had gotten upon the railroad tracks the engine returned from the east and from behind the blacksmith shop, and came within twenty feet of the team and within the limits of Jackson street, making a great deal of noise, and blowing off steam from the cylinder cocks and from the escape valve.

The evidence also shows that while the street was blocked by the train a dozen or more teams had approached the crossing and were waiting to pass along the street and over the tracks of the railroad. The evidence also tended to show that the team the plaintiff was driving had been frightened by the engine and cars at the same place about fourteen days previously, when driven by the plaintiff, and had then become unmanageable and run away. There was also some other evidence which tended to show that this team was excitable and difficult to manage in the vicinity of a railroad engine and train.

On the trial in the circuit court the jury returned a special verdict as follows: "*First.* Were the defendants or their servants guilty of negligence that contributed to the injury of the plaintiff? Answer. Yes. *Second.* If you answer the foregoing question 'yes,' state in what particular such negligence consisted. A. In the flagman's signal to the plaintiff to cross when the engine was too near, and engine allowed to make more noise than necessary. *Third.* Was the plaintiff guilty of negligence that contributed to the injury? A. No. *Fourth.* If the plaintiff is entitled to judgment, at what sum do you assess his damages? A. $1,000."

Judgment was entered in favor of the plaintiff for the damages found, and costs, and the defendants appeal to this court, and assign as reasons for the reversal of the judgment the following: "*First.* It was error to permit the plaintiff's witness Karrow to answer the following question: 'Well, now go on and state while you owned the horses as to their

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being fractious or wild, or vicious or gentle.' *Second.* It was error to permit the plaintiff to answer the following question: 'Did John Monahan or anybody else ever warn you about this team?' *Third.* It was error for the court to refuse to submit the questions to the jury asked by the defendants [hereinafter set forth]. *Fourth.* It was error for the court to give the instruction asked by plaintiff [hereinafter set forth]. *Fifth.* It was error to refuse the instruction asked by defendants [hereinafter set forth]. *Sixth.* It was error for the court to refuse the instruction as asked by defendants, and error to modify it as modified by the court, and error to refuse the latter portion of the instruction wholly."[1]

For the appellants there was a brief by *Charles W. Felker*, attorney, and *Howard Morris*, of counsel, and oral argument by *Mr. Felker.*

Gabe Bouck, for the respondent.

TAYLOR, J. The objection to the testimony of the witness Karrow was properly overruled. This witness claimed to have owned this team about a year before the accident, and had owned them for two years previously thereto, and knew the character and disposition of the team. As the excitability and nervousness of the team was to some ex-

[1] This instruction was as follows: "If the jury find from the testimony that the plaintiff drove a team of horses that he knew were easily frightened by a locomotive, while such locomotive was being used in switching cars, *it is for you to say from the evidence whether* it was negligence on his part to drive such team of horses in close proximity to defendants' railroad while defendants' servants were engaged in switching, [and if the horses became frightened by reason of the ordinary and usual noises made by such locomotive while engaged in such switching, and ran away, and the plaintiff was injured thereby, then you ought to answer question number three, 'Yes,']" The court inserted the words in italics, which were not in the instruction as asked, and omitted the words in brackets, and gave the instruction as thus modified. The other instructions referred to will be found stated in the opinion.—REP.

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tent a material question in this case, it seems to us that it was proper that this witness should be allowed to state what their character in this respect was when he owned them.

The second exception, to the question put to the plaintiff, "Did John Monahan or anybody else ever warn you about this team?" would seem to have been a proper exception, as it does not appear to have been material unless it had been claimed by the defendants that he had been so warned. But, if it be admitted that no such claim had been made on the part of the defendants, it seems to us that the answer to the question was so wholly irrelevant to the questions in issue that it could not have prejudiced the defendants, and should not therefore be held a sufficient ground for reversing the judgment in this case.

It is insisted that it was error to refuse to submit the following questions to the jury as a part of their special verdict: "(1) Did the team the plaintiff was driving run away because they were easily frightened by a locomotive and the noises usually made by locomotives when switching? (2) How far was the front of the locomotive from the plaintiff's horses or wagon at the time such horses first attempted to run?" We think there was no error in refusing to submit either of these questions. The answers to these questions would not have been conclusive of the right of either party to a verdict in the case. The questions in fact submitted to the jury covered the whole case.

An exception is taken to the instructions given to the jury, and two exceptions for a refusal to give certain instructions asked by the defendants. By an examination of the instructions given it appears that most of them were drawn up by the plaintiff's or by the defendants' counsel, and given as requested. It seems the counsel for the defendants proposed instructions covering the whole case, which were given by the court, and occupy over four pages of the printed case.

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The exception to the part of the instructions given at the request of plaintiff's counsel, it seems to us, is not well taken. The instruction excepted to reads as follows: "The fact that this team may have once before run away, or was easily frightened, was not contributory negligence on the part of the plaintiff unless the jury find that a person of ordinary care and prudence would not drive such a team over this railroad crossing under all the circumstances in this case, which is a question for you to determine from the evidence." This instruction, we think, is sufficiently favorable to the defendants, and is in fact the rule given by the counsel for the defendants in an instruction asked on their part and given by the court. The defendants asked the following instruction as to what constitutes ordinary care: "Ordinary care is such care as men generally use in the business in which they are engaged, regard being had to the business in which they are engaged." Understanding that the want of ordinary care in a given case is negligence, it seems to us that the instruction objected to is more favorable to the defendants than the one given at their request. The instruction in effect says that the plaintiff was guilty of negligence "if persons of ordinary care and prudence would not have done as he did under all the circumstances." This was certainly sufficiently favorable to the defendants, and is more favorable to the defendants than if he had said that he was not guilty of negligence if men generally would have done as he did.

It was argued that the court erred in refusing to instruct the jury as follows: "There is no evidence in this case tending to show that the operation of the engine immediately preceding the accident whereby plaintiff was injured was attended with any unusual noises or any unusual escape of steam, and, so far as these matters are concerned, you are not at liberty to find that the defendants were guilty of want of ordinary care." Upon the evidence in this case,

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we think this instruction was properly refused; and we are satisfied that the jury, under all the evidence in the case, was justified in finding negligence on the part of the flagman, and on the part of those managing the engine.

Taking the case as made by the plaintiff's testimony, as we must upon this appeal, we have this state of facts: The defendants had blocked a much traveled public street in the city of Oshkosh with their engine and cars for at least ten or fifteen minutes, and during that time ten or twelve teams had gathered upon the opposite side of the railroad tracks. The train is backed off the street, and the engine is hidden to those on the north side of the tracks. Immediately when the engine had passed the street, those standing on the north side are signaled to pass over, and instantly the engine changes its direction and approaches the street, blowing off steam from the cylinder cocks and from the escape valve, making a great noise, and discharging a great volume of steam, and in that way approaches ten or fifteen feet within the bounds of the street at the crossing, before the plaintiff, who stood but thirty feet north of the track and started immediately on receiving the signal, could pass the railroad tracks.

Under this state of facts, it appears to us that the jury might well say it was negligence on the part of those in charge of the engine to run into the street when they must have known there were teams passing, blowing off steam in the way it is said they did. The evidence does not show that there was any necessity for blowing off the steam as it is said they did at the time they came back upon the street, and when they must have known that there were teams passing the street at the time. Common prudence would dictate that it was not a proper thing to do when entering upon a public street in a city, when it was known that teams were passing at the time. We think the jury is supported by the evidence in finding that the flagman sig-

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naled too soon. He should have satisfied himself that those in charge of the engine were not intending to return immediately upon the street, before he signaled to the teams to cross. This is not controverted, and the signal man justifies himself by claiming the fact to be that the engine did not in fact return to the street, but continued its course easterly away from the street until after all the teams had passed over. And the engine-men also justify their conduct in blowing off steam, not because it was prudent and necessary to do so while crossing the street, but because they claim the engine was continuing its course easterly and away from the street until after the accident happened, and that at the time it happened the engine was east of the street from 75 to 150 feet, and was not on or near the street at all. Adopting the claim made by the plaintiff, and which is supported by the evidence given on his behalf as to the acts of the flagman and the movements of the engine, the findings of the jury are clearly supported by the authorities. See *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Guggenheim v. L. S. & M. S. R. Co.* 66 Mich. 150; *Petersburg R. Co. v. Hite*, 81 Va. 767; *Penn. R. Co. v. Horst*, 110 Pa. St. 226; *Manchester, S. J. & A. R. Co. v. Fullarton*, 14 C. B. (N. S.), 54; *Borst v. L. S. & M. S. R. Co.* 4 Hun, 346; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298; *Hahn v. S. P. R. Co.* 51 Cal. 605; 1 Thomp. Neg. 351, and cases cited in the notes. Under the rule of law established in these cases and many others that might be cited, it is very clear that the findings of the jury in this case are not unsupported by the evidence in the case.

By the Court.— The judgment of the circuit court is affirmed.

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THE STATE VS. LLOYD.

October 1 — October 14, 1890.

Criminal law and pleading: Perjury.

1. Where the statute requires an affidavit to state *the facts showing* that the affiant was not, at the completion of the registry, a qualified elector but has since become such, perjury cannot be assigned upon an affidavit stating merely that he was not at said time a qualified elector and that he has since become such.
2. An information charging perjury in the making of an affidavit should show that such affidavit was intended to be used in or was material to some judicial proceeding or inquiry before some officer having cognizance thereof.

EXCEPTIONS from the Circuit Court for *Dane* County.

The case is sufficiently stated in the opinion.

For the defendant there was a brief by *H. E. Briggs*, attorney, and *H. M. Lewis*, of counsel, and oral argument by *Mr. Briggs*. They contended, *inter alia*, that the affidavit upon which the charge of perjury was based was wholly ineffective because it failed to set forth the facts as required by the statute under which it was made. Perjury cannot be assigned upon immaterial statements. *Plath v. Braunsdorff*, 40 Wis. 107; 2 Bish. Crim. Law (6th ed.), sec. 1030. Nor upon a legal conclusion. *State v. Henderson*, 90 Ind. 406. Nor upon an affidavit, where the same was of no legal effect, or where the words alleged to be false therein were not required by law. *State v. Hobbs*, 40 N. H. 229; *Gibson v. State*, 44 Ala. 17; *Hood v. State*, id. 81; *Hembree v. State*, 52 Ga. 242; *U. S. v. Howard*, 37 Fed. Rep. 668; *Billings v. Noble*, 75 Wis. 325; *Miller v. Munson*, 34 id. 579; *Goodyear Rubber Co. v. Knapp*, 61 id. 103. The information was insufficient because it failed to show that the affidavit upon which perjury was assigned was intended to be used in a judicial proceeding. *State v. McCone*, 59 Vt. 117; *People v. Fox*, 25 Mich. 492; *State v. Lamont*, 2 Wis.

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438; *People v. Gaige*, 26 Mich. 30; *U. S. v. Robinson*, 23 N. W. Rep. (Dak.), 90; *State v. Peters*, 57 Vt. 86; *Jacobs v. State*, 4 Am. Cr. Rep. 465; *S. C.* 61 Ala. 448; *State v. Wood*, 110 Ind. 82; *State v. Reynolds*, 108 id. 353; *State v. Street*, 3 Am. Dec. 682; *S. C.* 1 Murph. (N. C.), 156; *State v. Beard*, 25 N. J. Law, 384.

For the state there was a brief by the *Attorney General* and *L. K. Luse*, Assistant Attorney General, and oral argument by *Mr. Luse*.

Orton, J. The information in this case attempts to charge the defendant with the crime of perjury in making a voluntary affidavit, and he was tried, found guilty, and sentenced to the state prison for said offense. Motions in arrest and for a new trial were overruled. The defendant alleged exceptions, which were duly allowed by the judge of the court, under sec. 4720, R. S.

We find the following material errors involved, substantially, in the first three of said exceptions: (1) The affidavit on which perjury is assigned is not in compliance with the statute. (2) The information fails to state that the affidavit was made to be used in and material to any judicial proceeding, or to be used in and material to any proceeding in which it was required by law.

The affidavit on which the information is founded, and in which it is copied, is as follows: "That he did not appear before the board of registry of the Fifth ward, Madison, state of Wisconsin, on the last day of their meeting for completing the registry of electors for said election district, for the reason that he was not then a qualified elector in said election district on account of — not in town — business, but that he has, since the said completion of said registry, become a qualified elector of said district, by reason of being a qualified voter, and that he now resides at 620 University avenue." The oath was taken before Henry

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Kessenich, notary public, Dane county, on the 2d day of November, 1886. The statute requiring an affidavit in such a case (sec. 24, R. S.) is as follows: "But in case any one shall, after the last day for completing such registry and before such election, become a qualified voter of the election district, he shall have the same right to vote therein at such election as if his name had been duly registered: provided, he shall, at the time he offers to vote, deliver to the inspectors his affidavit, *in which he shall state the facts showing* that he has, since the completion of such registry, become a qualified elector of such district, *and the facts showing* that he was not such an elector on the day such registry was completed." The italics are not in the statute. The information states that said affidavit became and was material to an inquiry then pending before Henry Kessenich, he being then and there a notary public for the county and state aforesaid.

1. The material defect of this affidavit is apparent. It is not such an affidavit as the statute requires. It states the mere conclusions that he was not then a qualified elector, but that he has since become a qualified elector by reason of being a qualified voter. The statute requires that "he *shall state the facts showing*" both such qualification and disqualification. No such facts are stated in the affidavit. What he has stated in place of such facts is as immaterial as if he had stated nothing. *Plath v. Braunsdorff*, 40 Wis. 107; *Lathrop v. Snyder*, 16 Wis. 293; *Miller v. Munson*, 34 Wis. 579; *Goodyear Rubber Co. v. Knapp*, 61 Wis. 103. The learned counsel of the plaintiff in error has cited in his very able brief many other cases from other states, to which reference may be had. The principle is elementary that in such a case the statute must be strictly pursued or the affidavit is unknown to the law. It was on these *absent* facts that the perjury, if any, should have been assigned. The statute does not require it to be stated that he was not

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then and has since become a qualified elector, but the *facts showing* it. The perjury is assigned on what the statute does not require to be stated in the affidavit. The information, therefore, states no crime.

2. The information should state that the affidavit was intended to be used in or was material to some judicial proceeding or inquiry before some officer having cognizance thereof. In this instance the affidavit was no doubt intended to be delivered to the inspectors of election, by which they might determine the defendant's right to vote. *State v. McCone*, 59 Vt. 117; 2 Bish. Crim. Proc. §§ 905–911; *State v. Lamont*, 2 Wis. 438; *People v. Fox*, 25 Mich. 492. See other authorities cited in the brief of the defendant's counsel as to the requisites of such a statement. The information states that "such affidavit became and was material to an inquiry then pending before Henry Kessenich, he being then and there a notary public," etc. It does not appear that said notary public had anything to do with any inquiry or proceeding whatever, or had anything to do with the affidavit, except to administer the oath to the affiant and attach his jurat thereto. The information is essentially defective in this respect.

For both of the above reasons the court should have arrested the judgment.

There having been no stay of proceedings on the exceptions so allowed, the defendant on conviction was sentenced to and is now in the state prison.

By the Court.— The said first three of said exceptions are sustained. The judgment of the circuit court is reversed, and the cause is remanded with direction to vacate and set aside said judgment and discharge the defendant from all custody and imprisonment.

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ELIOT, Respondent, vs. ELIOT, Appellant.

October 2 — October 14, 1890.

MARRIAGE: ANNULMENT. (1) *Pleading: Residence of plaintiff.* (2) *Cohabitation before age of consent: Construction of statutes.* (3) *Age of consent: Abrogation of common-law rule.* (4) *When action may be maintained.* (5) *Suit money.*

1. In an action for the annulment of a marriage an averment in the complaint that the parties have been residents of this state for "one year immediately preceding the commencement of this action," is sufficient in respect to the residence of the plaintiff, under sec. 2359, R. S.
2. Under secs. 2350, 2353, R. S., voluntary cohabitation of the parties before the age of legal consent is reached does not defeat an action for the annulment of a marriage on the ground of want of age to assent thereto. The words, "and there shall have been no subsequent voluntary cohabitation of the parties," in sec. 2350, are *held* to relate only to marriages to which consent has been obtained by force or fraud,—such construction being necessary in order to give effect to sec. 2353.
3. Sec. 2329, R. S. (providing that persons having attained the ages therein specified shall be capable in law of contracting marriage), abrogates the common-law rule as to ages of consent, although it does not expressly declare that persons under the ages specified shall be incapable of contracting marriage.
4. An action for the annulment of a marriage on the ground that the plaintiff was under the age of legal consent may be maintained before he reaches that age.
5. It appearing in this case that the plaintiff has no pecuniary means and no capacity for earning money, but that his father is of ample pecuniary ability and is to some extent responsible for the suit, and that the defendant's father is not able to bear the expenses of the litigation, this court, in the exercise of its discretion in view of all the circumstances of the case, requires the plaintiff to pay $100 suit money to the defendant.

APPEAL from the Superior Court of *Milwaukee* County.

This action was commenced February 21, 1890, to obtain the annulment of a marriage, under sec. 2350, R. S. The complaint alleges that the parties intermarried at the city of

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Milwaukee, in this state, January 5, 1890; that they have been residents of this state for the period of one year or more immediately preceding the commencement of the action; that at the time of said marriage the plaintiff had not attained the age of eighteen years, but was of the age of fifteen years on the 23d day of February, 1889; and that he has not yet attained the age of eighteen years. The relief demanded is that such marriage be decreed void from such time as shall be fixed by the judgment of the court.

The defendant demurred to the complaint on the grounds that it appears therefrom the court has no jurisdiction of the person of the plaintiff or the subject of the action, and that it does not state facts sufficient to constitute a cause of action.

After the demurrer was interposed, the plaintiff amended his complaint by adding thereto the following averments: "That on the day of said marriage, and on the day succeeding said marriage, the plaintiff and defendant had or attempted to have sexual intercourse, but at no time since said marriage have they lived together or cohabited as man and wife, or had or attempted to have sexual intercourse, except as aforesaid, and there is no possibility of issue of said marriage." The demurrer (which has been regarded and treated on all hands as a demurrer to the amended complaint) was overruled by the superior court. The defendant appeals from the order overruling the same.

For the appellant there was a brief by *Howard & Schmitt*, and oral argument by *Samuel Howard*. They contended, *inter alia*, that since our statute fixing the age of consent does not by express words declare marriages under such age void, it affects only their legality and not their validity. *Catterall v. Sweetman*, 1 Rob. Ecc. 304, 317, 320; *Meister v. Moore*, 96 U. S. 76, 79; *Blackburn v. Crawfords*, 3 Wall. 175, 185, 194; *Campbell's Adm'r v. Gullatt*, 43 Ala. 57, 67,

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68; *Park v. Barron*, 20 Ga. 702; *Askew v. Dupree*, 30 id. 173; *Stevenson v. Gray*, 17 B. Mon. 193; *Harrison v. State*, 22 Md. 468; *Jones v. Jones*, 45 id. 144, 159; *Hutchins v. Kimmell*, 31 Mich. 126; *Dickerson v. Brown*, 49 Miss. 357; *Hargroves v. Thompson*, 31 id. 211; *Dyer v. Brannock*, 66 Mo. 391; *Walter's Appeal*, 70 Pa. St. 392; *Rodebaugh v. Sanks*, 2 Watts, 9; *Pearson v. Howey*, 11 N. J. Law, 12; *State v. Robbins*, 6 Ired. Law, 23; *Peck v. Peck*, 12 R. I. 485. A marriage good at the common law is good notwithstanding any statute on the subject, unless the statute contains express words of nullity, that is, unless it prohibits the marriage absolutely and declares it to be void. 1 Bish. M. & D. sec. 283; *Catterall v. Sweetman*, 1 Rob. Ecc. 304; *Stallwood v. Tredger*, 2 Phillim. 287; *Londonderry v. Chester*, 2 N. H. 268; *Pearson v. Howey*, 11 N. J. Law, 12, 19, 20, opinion of FORD, J.; *Rodebaugh v. Sanks*, 2 Watts, 9, 11; *Helffenstein v. Thomas*, 5 Rawle, 209; *State v. Robbins*, 6 Ired. Law, 23; *Newburg v. Brunswick*, 2 Vt. 151; *Lacon v. Higgins*, 3 Stark. 178; *King v. St. Faiths*, 2 Dowl. & R. M. C. 38; *Dumarsly v. Fishly*, 3 A. K. Marsh. 368; *Rex v. Birmingham*, 8 B. & C. 29, 34; *Hargroves v. Thompson*, 31 Mo. 211; *Park v. Barron*, 20 Ga. 702; *Stevenson v. Gray*, 17 B. Mon. 193, 209; *Ferrie v. Public Adm'r*, 4 Bradf. 28; *Bashaw v. State*, 1 Yerg. 177; *Milford v. Worcester*, 7 Mass. 48, 55; *Holmes v. Holmes*, 6 La. 463; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; *Parton v. Hervey*, 1 Gray, 119; *White v. Lowe*, 1 Redf. 376; *Campbell's Adm'r v. Gullatt*, 43 Ala. 57; *Blackburn v. Crawfords*, 3 Wall. 175; *State v. Murphy*, 6 Ala. 765; *Northfield v. Plymouth*, 20 Vt. 582. Our statute fixing the age of consent is permissive, and does not repeal the rule of the common law. 1 Bish. M. & D. sec. 145; *Goodwin v. Thompson*, 2 Greene (Iowa), 329; *Parton v. Hervey*, 1 Gray, 119; *Bennett v. Smith*, 21 Barb. 439; *Fitzpatrick v. Fitzpatrick*. 6 Nev. 63. The rules of

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the common law cannot be repealed by implication, but the intent to repeal them must be clearly expressed. *Meek v. Pierce*, 19 Wis. 300; *Orton v. Noonan*, 29 id. 541.

For the respondent there was a brief by *Van Dyke & Van Dyke*, and oral argument by *G. D. Van Dyke*. They argued, among other things, that under the statutes of this state the age of consent has been raised to fifteen in females and eighteen in males; that a marriage between parties either of whom is below the age of consent, if not absolutely void, is at least voidable by the party below the age of consent at any time while within the age of consent, or at any time after he has arrived at that age if he has not ratified the marriage after arriving at that age. R. S. secs. 2328, 2329, 2350, 2353; Circuit Court Rule XXIX, sec. 1; *People v. Slack*, 15 Mich. 193; *People v. Bennett*, 39 id. 208; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Shafher v. State*, 20 Ohio, 1; *McDowell v. Sapp*, 39 Ohio St. 558; *McDeed v. McDeed*, 67 Ill. 546; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Koonce v. Wallace*, 7 Jones (N. C.), 194.

LYON, J. I. The first ground of demurrer assigned is that the court has no jurisdiction of the person of the plaintiff. This is based on the assumption that the complaint fails to show the plaintiff was a resident of this state when the action was commenced. But we think the complaint sufficiently alleges such residence. The averment therein is that the parties have been residents of this state for "one year immediately preceding the commencement of this action." We do not perceive how this can be true and the plaintiff have been a nonresident of the state when the action was commenced. Moreover, the provision of the statute on this subject (R. S. sec. 2359), so far as applicable here, is that "no divorce shall be granted unless the plaintiff shall have resided in this state one year immediately preceding the time of the commencement of the action, un-

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less," etc. Undoubtedly this statute is applicable to this action. The complaint follows substantially the language of the statute in respect to the residence of the plaintiff, and shows that he is not within the prohibition of sec. 2359. This is sufficient.

II. The second and third grounds of demurrer go to the sufficiency of the complaint. They will be considered in their order.

1. It is claimed that, if the parties voluntarily cohabited after the marriage, no action can be maintained under sec. 2350 for the annulment of the marriage, and that the amended complaint shows such cohabitation. Although the learned counsel for the respective parties agree that the complaint may be considered as containing an averment of voluntary cohabitation after marriage, the fact is there is no such averment therein. It is only stated that after the marriage the parties "had or attempted to have sexual intercourse." This falls far short of an averment that they had such intercourse. In determining the validity of a pleading we must take it as it is, notwithstanding counsel agree that, for the purposes of the argument and decision, it may be treated as something which it is not. Hence, we cannot regard the amended complaint as containing an allegation of such voluntary cohabitation. But if the construction of sec. 2350 for which counsel for defendant contends be adopted, we are willing to assume, for the purposes of this appeal, that the complaint should negative such cohabitation. This not being done, if defendant's construction of the statute prevails, the complaint would (on the above assumption) be equally as defective as though it expressly admitted such cohabitation. This view renders a construction of the statute necessary. Sec. 2350 reads as follows: "When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have

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been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof." If the grammatical construction of the section alone be considered, it must be conceded, we think, that the qualifying words "and there shall have been no subsequent voluntary cohabitation of the parties" refer to and control actions for the annulment of marriages for incapacity to assent thereto for want of age or understanding as well as those to which assent has been obtained by force or fraud. But this is not conclusive. If there is anything in the statutes which evidences a contrary intention on the part of the legislature, such intention ought to prevail. We are of the opinion that sec. 2353 contains a provision which manifests such contrary legislative intention. It reads thus: "No marriage shall be declared a nullity on the ground that one of the parties was under the age of legal consent, if it shall appear that the parties, after they had attained such age, had, for any time, freely cohabited together as husband and wife." This provision is *in pari materia* with sec. 2350, and they must be construed together.

If voluntary cohabitation *before* the age of consent defeats an action for the annulment of a marriage under sec. 2350, there is no necessity for the provision in sec. 2353 that such cohabitation *after* the age of consent is reached shall have that effect. In that case it would be entirely superfluous. But if the qualifying words in sec. 2350 be held to relate only to actions to annul marriages to which consent has been obtained by force or fraud, both sections are operative. We must assume the legislature intended that both should be operative, else both would not have been enacted. This is too plain an evidence of legislative intention to be disregarded.

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The same construction was given to the above statutes by the justices of this court in circuit court rule XXIX, adopted in 1879. It contains the following provisions: "Where an action is brought to declare a marriage a nullity on the ground that the plaintiff was under the age of legal consent, the complaint must allege that the plaintiff has not yet attained such age, or that the parties have not voluntarily cohabited together as husband and wife after the plaintiff has attained the age of legal consent. If such action be brought on the ground that the consent of the plaintiff was obtained by force or fraud, the complaint must allege that the parties have not voluntarily cohabited together since the discovery of the fraud." For the reasons above suggested we must hold that voluntary cohabitation of the parties before the age of legal consent is reached does not defeat an action for the annulment of a marriage on the ground of want of age to assent thereto.

The view we have taken of this branch of the case renders it unnecessary to determine here the meaning of the term "voluntary cohabitation" as the same is used in the statutes above cited, which was discussed by counsel in argument.

2. Sec. 2329, R. S., provides that "every male person who shall have attained the full age of eighteen years, and every female who shall have attained the full age of fifteen years, shall be capable in law of contracting marriage, if otherwise competent." We have no statute which expressly provides that persons under the ages respectively named shall be incapable of contracting marriage. Because of the omission of such prohibition in the statute, counsel for defendant has submitted an argument in support of the proposition that valid and binding marriages may still be contracted by persons who have reached the common-law ages of consent (which is understood to be fourteen years for males and twelve years for females), although they have not reached the respective ages specified in the statute. The argument

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is ingenious, and the position is not unsupported by authority; but we think the weight of authority, as well as the better reason, is against it. *People v. Slack*, 15 Mich. 193, holds that the common-law rule as to the ages of consent is abrogated by a statute like our sec. 2329. Judge COOLEY delivered the opinion of the court, and the case is an instructive one. Other cases to the same effect are cited in the brief of counsel for plaintiff.

3. Lastly, counsel for defendant maintains that if the right to an annulment of this marriage for want of age exists, the plaintiff cannot be heard to assert such right until he reaches the statutory age of consent, to wit, eighteen years. Some such rule may have prevailed in early times, but the later authorities seem to reject it, we think for sufficient reasons. Tyler, in his treatise on Infancy and Coverture, says: "The better opinion now is that parties marrying before the age of consent may dissent to the marriage within nonage, and thus avoid it *in toto*." Page 126.

This marriage is not an absolute nullity. It is only annulled from such time as shall be fixed by the judgment of the court. Sec. 2350. That time may, and in many contingencies should, be fixed at a later date than that of the marriage. During the time intervening the marriage is valid. It is, so to speak, a marriage on condition subsequent, the condition being its disaffirmance by a party thereto and annulment thereof by the court from the time named. If the plaintiff had capacity to become a party to such imperfect and inchoate or conditional marriage, he should have capacity to disaffirm it any time thereafter, before it has ripened into an absolute marriage, by invoking the authority of the court to annul it under the statute. No good reason is perceived why the parties should be compelled to remain in so unfortunate a position until the plaintiff becomes eighteen years of age. Again, rule XXIX,

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above cited, recognizes the plaintiff's capacity to maintain the action before he reaches that age, by prescribing what the complaint shall contain if the action is thus brought. We must hold, therefore, that the plaintiff may may maintain this action, although he has not reached the age of legal consent.

Upon the whole case our conclusion is that the court properly overruled the demurrer to the complaint.

III. The defendant has submitted a motion that the plaintiff be required to pay her a reasonable sum for her expenses of the action in this court. The motion was based upon letters addressed by plaintiff to defendant since the marriage, and upon affidavits, and was resisted by counter-affidavits. The contents of these need not be here stated any further than to say they show the plaintiff has no pecuniary means and no capacity to earn money; that his father is a man of some wealth, and advised the commencement of this suit, and aided in its prosecution by retaining counsel for his son, and that defendant's father is not able to bear the expenses of the litigation. In view of these circumstances, and of all the circumstances in the case so far as we know them, we have reached the conclusion, although not without some doubt and hesitation, that the plaintiff should be required to bear some reasonable portion of the defendant's expenses of the litigation in this court. But no very large sum can properly be allowed. We have concluded to fix it at $100. The decision of this court on the demurrer settles the law of the case in several important particulars, and we see no good reason why the case should hereafter be long protracted or very expensive. The plaintiff's father is of ample pecuniary ability, and is to some extent responsible for this suit. Although under no legal obligation to advance the money required, we think plaintiff's guardian may reasonably expect that he will do so. In

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this matter this court exercises its discretion, without assuming to interfere with the discretion of any other court on similar applications.

By the Court.— The motion for suit money is granted, and an order therefor will be entered, as above indicated, giving the plaintiff twenty days from the entry of the order in which to comply therewith. The order of the superior court overruling the demurrer to the complaint is affirmed, without costs.

MINAGHAN, Plaintiff in error, vs. THE STATE, Defendant in error.

October 2 — October 14, 1890.

Assault with intent to kill: Charivari: *Evidence of custom.*

The plaintiff in error, who had just been married, fired into, and wounded one of, a *charivari* party which, for the third time, had assembled in front of his house and was serenading him with the firing of guns, blowing of horns, beating upon pans, etc. Upon his trial for an assault with intent to kill, witnesses for the state were allowed to testify that it was customary in that neighborhood to give a newly married couple a *charivari* unless there had been a public wedding to which all the people of the neighborhood were invited. *Held*, error.

ERROR to the Circuit Court for *Outagamie* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The information charges the plaintiff in error with wilfully and feloniously assaulting and shooting John Higgins, with intent to kill and murder him, June 25, 1887. To that charge the accused pleaded "not guilty."

In charging the jury, the learned trial judge stated, in effect, that the testimony on the part of the state tended to establish that the defendant was a farmer, and had for

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twenty years and upwards lived in the town of Chilton, Calumet county; that he was married about twenty years before, and by his first wife had several children, some of whom were quite young, and others partially grown up; that in 1885 his first wife died; that June 14, 1887, he married another woman, and took her to his home; that on Saturday evening, about 9 or 10 o'clock, June 18, 1887, a company of young men of the neighborhood, to the number of fifteen or more, went into the road beside the defendant's house, with guns, cow-bells, sap-pans, saws, and various other things; that they sent one of their number to the door of the defendant's house, and asked him for five or ten dollars to invest in beer or other refreshments; that the messenger went to the door, and informed the defendant, in substance, that the boys were in the road, and wanted five or ten dollars for refreshments, and would not give him a *charivari* if he advanced the money; that he refused to give them anything, and ordered them away; that the company then serenaded him for some time with gunshots, by blowing horns, beating on pans and fences, and perhaps with other noises; that on Wednesday evening, June 22, 1887, most of the party returned, and went through similar performances for some one or two or more hours; that on Saturday evening, June 25, 1887, about the same parties again assembled near the defendant's house, in the road, and for some time proceeded to fire guns, beat on pans, blow with horns, etc.; that after a season the defendant fired into the assembly of people there collected, at first with fine shot from a gun, and then in a moment after with ball from a gun or pistol; that some seven or eight of the people there assembled were wounded by the shot, and the complainant, John Higgins, with the ball fired; that the testimony on the part of the defense was substantially to the same effect, with the exception that it tended to prove that the conduct of those assembled was of a more aggra-

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vated character in several respects than represented by the testimony on the part of the state; that such testimony tended to prove that on the first night $15 was demanded of the defendant by the company, with threats that, if he did not advance them that amount, they would come in the future and demand more money; that they called the defendant vile and indecent names; that they threw a heavy missile against his house on one or more of the evenings; that they used obscene language to him in the hearing of his family; that they fired guns so that it appeared as if a battle was going on; that they called out to each other to load with balls and shoot the defendant; that they pulled up his hitching post and broke his fence on one occasion; that on the second evening they cut an obscene figure on one of his gateposts; that, after his premises had been visited the second time by said parties, the defendant purchased powder and shot; that on the first and third evenings he went out near to the assembly to see if he could identify any of them, and could not do so; that the defendant's wife and small children, or child, were in great fear and terror, so much so that his wife has ever since had her nerves affected, and his youngest child was so alarmed that for some days or weeks she would wake up in the night, and scream with fright occasioned by those disturbances; that finally, on the last night they were there, the defendant went to a neighbor, and borrowed a double-barreled gun, having one barrel charged with powder and shot, and the other with powder and ball, as that barrel was for balls and did not carry shot without injury; that, when about 150 feet from the assembly, he fired the barrel charged with powder and shot in the direction of them; that they did not appear to mind that, and so, in a short time thereafter, he fired the barrel charged with powder and ball in the direction of the crowd, and on both occasions fired low, so that, if any one was hurt, serious injury would not be

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inflicted; that he had no intention of killing any one, and he avers and says he only tried to scare them away, to protect his wife and child from the danger they were in and from the fear they were suffering; that there is no proof or claim that the defendant, at the time of discharging his gun, or at all on that last night, had ordered the said Higgins, or those with him, to go away from his premises, or to desist from making the noise which they were engaged in making.

At the close of the trial the jury returned a verdict of guilty of an assault merely. Upon that verdict the court entered judgment fining the defendant $10 and $371.20 costs. To review that judgment the defendant has sued out this writ of error.

For the plaintiff in error there was a brief by *Nash & Nash*, and oral argument by *L. J. Nash*. As to the inadmissibility of the evidence relating to an unlawful custom, they cited *Hawkins v. State*, 50 Am. Rep. 129; *Seagar v. Sligerland*, 2 Caines, 219; *Bankus v. State*, 4 Ind. 114; Lawson, Usages, 61, 62, 460, 461.

For the defendant in error there was a brief by the *Attorney General* and *L. K. Luse*, Assistant Attorney General, and the cause was argued orally by the *Attorney General* and *J. E. McMullen*.

CASSODAY, J. A civil action involving the same facts was before us at the last term. *Higgins v. Minaghan*, 76 Wis. 298. The accused owned the land on both sides of the road in front of and in the immediate vicinity of his house. The several persons who assembled in front of that house on the three occasions named had the legal right to use that road for travel, but for no other purpose, especially after being notified by the accused to leave the premises, as they confessedly were on the first night they appeared. The demonstration made in front of the house on each of the evenings

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named, was confessedly an assault upon the accused and the several members of his family. The statute expressly declares, in effect, that any person who shall make any inexcusable or unjustifiable assault upon another, or who shall use, in reference to and in the presence of any member of his family, abusive or obscene language, intended or naturally tending to provoke an assault or any breach of the peace, shall be punished by imprisonment in the county jail, etc. Sec. 4398, S. & B. Ann. Stats. The statute also provides, in effect, that any three or more persons who shall assemble in a violent or tumultuous manner to do an unlawful act, or, being together, shall make any attempt or motion towards doing a *lawful* or an unlawful act, *in a violent, unlawful, or tumultuous manner*, to the terror or disturbance of others, shall be deemed an unlawful assembly; and, if they commit such acts in the manner and with the effect aforesaid, they shall be deemed guilty of a riot, and punished as prescribed. Sec. 4511, R. S. The statute also provides, in effect, that any person who shall, either *verbally* or by any written or printed communication, maliciously threaten to do any injury to the person or property of another, with intent thereby to extort money, or with intent to compel the person so threatened to do any act against his will, or omit to do any lawful act, shall be punished by imprisonment in the state prison, etc. Sec. 4380, S. & B. Ann. Stats. Such are some of the offenses which the assailants of the accused confessedly committed on the several nights of June 18, 22, and 25, 1887. Of course the perpetrators of those offenses were not on trial in this action; and we are not sitting in judgment on their conduct in the premises, except in so far as the same may be regarded as a provocation, excuse, or justification of the offense for which the accused was tried in the case at bar. These provisions of the statutes, in connection with the foregoing statement of facts, will serve to make more manifest some of the errors relied upon for a reversal.

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The prosecution was allowed to prove, in effect, by the first witness sworn in the case, and against timely objections on the part of the accused, that it had been the custom in that part of the country, upon the marriage of any persons who failed to have a public wedding, and invite in all the people of the neighborhood, and treat them to beer, something to eat, and so on, to give them a *charivari*. This was followed by the testimony of at least two witnesses on the part of the state, taken under timely objections, to the effect that such custom existed in that part of the country. Such evidence was peculiarly calculated to influence the jury. Assuming that such custom furnished some excuse for assembling near the house of the accused in the first instance, which is very doubtful, yet it furnishes no excuse for remaining and conducting themselves in the way they did for hours after it is conceded they were ordered to leave the premises, nor for their returning on the two subsequent evenings. The accused had the legal right to get married in a private way, without treating or feasting any one; and, assuming that he did, yet it furnished no excuse for extorting money or assaulting the accused and his family in the manner conceded, much less in the manner testified to on the part of the accused. If it is not an established maxim, it ought to be, that no one can escape the punishment of the law by proving a custom contrary to law. It is for the good name of that community, and the honor of our commonwealth, that the laws prescribed by rightful authority shall be maintained in their integrity; and every true citizen should be interested in maintaining the same, any particular custom to the contrary notwithstanding.

There are other errors in the record, but, in view of what has been said, they are not likely to be repeated, and hence need not be here considered.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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RINDSKOPF, Respondent, vs. MYERS, Appellant.

October 3 — October 14, 1890.

Debtor and creditor: Fraudulent conveyance: Evidence: Opinions: Reversal of judgment.

The question being whether a sale of chattels was fraudulent as to the vendor's creditors, the opinion of a witness who was present and assisted in making the sale, as to the honesty or dishonesty of the transaction, is inadmissible; and the admission of such opinion is a material error, even though all the facts relating to the sale were before the jury.

APPEAL from the Circuit Court for *Wood* County.

Action for the wrongful conversion of chattels. The facts will sufficiently appear from the opinion. The defendant appeals from a judgment in favor of the plaintiff.

James O'Neill, attorney, and *F. C. Winkler*, of counsel, for the appellant, argued, among other things, that a witness cannot testify as to the intentions of another, but must speak from *facts* within his own knowledge, and not the inferences that he may draw from the facts or circumstances known to him. Bump, Fraud. Conv. 553; *Peake v. Stout*, 8 Ala. 647. The debtor may testify as to his own intent. *Forbes v. Waller*, 25 N. Y. 430. And the purchaser as to *his own* intent. *Bedell v. Chase*, 34 N. Y. 386. But the opinions of parties are of very little weight, and entitled to little consideration. *Work v. Ellis*, 50 Barb. 512.

R. J. MacBride, for the respondent.

TAYLOR, J. This action was brought to recover the value of a stock of goods which the plaintiff claimed to have purchased of one Hyman Nathan. The defendant, as sheriff, had seized the goods upon attachments issued by the creditors of Hyman Nathan, and the defense set up by the sheriff was a justification under such attachments, alleging that

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the sale of said stock of goods, claimed to have been made by Nathan to the plaintiff, was fraudulent and void as to Nathan's creditors.

Several actions have grown out of this transaction between *Rindskopf* and Nathan. One case came before this court, and is reported in 71 Wis. 639. The present case, it seems, has been twice tried, resulting in a verdict for the plaintiff on both trials; but the circuit judge before whom the action was first tried set aside the verdict for the plaintiff and granted a new trial. On the second trial the plaintiff has again obtained a verdict, after a strongly contested defense made by eminent counsel. Still, after looking into the evidence in the case, we are impressed with the idea that the sale was a suspicious one, and that the evidence is not so strongly in favor of the verdict found by the jury as would justify this court in affirming the judgment if any errors were committed on the trial which might tend to prejudice the rights of the appellant. Without further considering the merits of the plaintiff's case, or of the defense of the defendant, we shall proceed to the consideration of the exceptions taken to certain evidence admitted on behalf of the plaintiff against the objection of the defendant, and as we have come to the conclusion that the judgment under the circumstances of this case, because of the error in admitting such evidence, must be reversed, we shall not pass upon many other points in the case which have been very ably discussed in this court by the learned counsel for the respective parties.

Louis Rindskopf, a brother of the plaintiff, who, as the evidence tends to show, negotiated the sale from Nathan to the plaintiff, and who, it seems, furnished all the money that was claimed to have been paid to Nathan for the stock of goods, was a witness on behalf of the plaintiff. His testimony was taken by deposition, and among the interrogatories put to such witness were the following: "Question.

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Did you know, or did you have any reason to believe, that in this transaction between your brother, *Elias Rindskopf*, and Hyman Nathan, on the sale of the stock of goods at Neillsville, of any intent, either on the part of your brother, *Elias*, or on the part of Hyman Nathan, to cheat, hinder, or defraud the creditors of Hyman Nathan, or any or either of them? Q. Was the transaction, so far as you know, a straight, honest business transaction between your brother, *Elias*, and Hyman Nathan?" These questions were objected to by the defendant as incompetent. The court overruled the objections, and the witness answered the first question, "I did not;" and the second, "I have considered it as such. I wouldn't have given him the money."

Considering the relations of the witness, Louis Rindskopf, to this transaction between Nathan and the plaintiff, the fact that Louis was present, and the active agent of both parties, and knew all that took place in regard to the negotiations and sale, and furnished most, if not all, the money which it is claimed was paid by the plaintiff to Nathan for the stock of goods, it appears to us that it was clearly error to permit him to testify in a general way that the trade was in his opinion a fair and honest business transaction. The questions called for the opinion of the witness upon the whole transaction, as to its honesty or dishonesty. We think the honesty or dishonesty of a sale and purchase of goods, when the sale is attacked as fraudulent as to the creditors of the vendor, is pre-eminently a question of fact to be found by the court or jury trying the case. It is in no way a question for experts, and cannot be established by the opinion of the witnesses who were present and assisted in making the sale. What the witness' opinion is based on is not disclosed by the testimony, and it may have been based upon facts which, if disclosed to the court or jury, would have led to an entirely different opinion on the part of the jury or court.

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It seems to us that the questions were clearly objectionable, as calling for the opinion of the witness upon a vital point in the plaintiff's case, and in regard to a matter which does not call for expert testimony. *Kelley v. Fond du Lac*, 31 Wis. 179; *Mellor v. Utica*, 48 Wis. 457, and cases cited in the opinion on pages 459, 460; *Conner v. Stanley*, 67 Cal. 315; *Blaut v. Gabler*, 8 Daly, 48; *Walker v. Walker's Ex'r*, 34 Ala. 469.

But it is urged that, although the questions and answers were strictly incompetent, still the judgment ought not to be reversed for that cause. It is said that the jury were possessed of all the facts in the case as disclosed by a thorough examination of this witness as to all that took place at the time of this sale, and of all the knowledge that the witness had in regard to it, and so they could tell whether his opinion in regard to the sale was sound or otherwise, and that consequently the defendant could not be prejudiced by permitting the witness to declare his opinion of the matter under oath as a witness in the case. We are not aware that this argument has ever been allowed to prevail to cure an error of this nature. Neither this court nor any other court is able to say that the opinion of this witness, given to the jury under the sanction of an oath, did not weigh with them in coming to a conclusion that the transaction was an honest one, so far as the plaintiff was concerned. This is not the case of admitting evidence which is irrelevant and immaterial, and when the testimony has no real probative force in proving or disproving the issues in the case, and so may be disregarded by the appellate court when the verdict of the jury is supported by the other evidence in the case. The questions in this case are directed to the vital point in issue, and the court having decided that the witness might give his opinion on that point, the jury would necessarily understand that such opinion was competent evidence to establish the truth or falsity of the

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claim of the defendant that the sale was a fraudulent one. The court having committed an error in allowing this evidence to be given on the part of the plaintiff, the judgment must be reversed for that cause.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SHEALY and others, Respondents, vs. THE CHICAGO, MADISON & NORTHERN RAILROAD COMPANY, Appellant.

October 14 — November 5, 1890.

Railroads: Eminent domain: Changing grade of street: Measure of damages.

In order to restore to its former usefulness a street crossed by its track, the defendant railroad company lowered the grade of such street, digging and removing the earth in front of plaintiffs' lot. *Held*, that although no part of such lot was taken for the right of way of the railroad, the company must make full compensation for the injury to the lot, including the depreciation in value resulting from the operation of the railroad in proximity thereto.

APPEAL from the Circuit Court for *Dane* County.

Proceedings for the condemnation of land taken by the defendant railroad company. A former appeal is reported in 72 Wis. 471. Upon an appeal from the award of the commissioners the trial in the circuit court resulted in a verdict as follows: "(1) What was the fair market value, at the time it was taken, of the earth and material which was taken from the part of the plaintiffs' lot in Main street in order to restore the street to such condition as that its usefulness should not be materially impaired? Answer. $56.25. (2) What amount of damage to plaintiffs' lot was occasioned by cutting down and restoring the street in front of the same, and by constructing and operating the

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railroad where the same was and is now built? A. $2,000; interest, $91 — total, $2,091. (3) What part of said damage was occasioned by cutting down the street? A. $1,750; interest, $79.625 — total, $1,829.625. (4) What part of said damage was occasioned by the operation of the railroad? A. $250; interest, $11.375 — total, $261.375." Upon this verdict, judgment for the whole amount thereof, to wit, $2,147.25, with costs, was entered in favor of the plaintiffs. The defendant appeals.

B. J. Stevens, for the appellant, contended that the trial court erred in giving judgment for the damages occasioned by the operation of the railroad. The rule of damages applicable to a permanent taking of land, whereby title passes to the company, should not be applied to a temporary taking whereby no title passes and no continuing possession is given, and which is not taken for the purpose of "operating the proposed railroad" (sec. 1846, R. S.), but is taken for the purpose of "restoring a public street to its former state, or to such condition as that its usefulness" (as a street) "shall not be materially impaired," and which street, as changed, is to be held "by the same tenure by which the adjacent parts thereof are held" (sec. 1836). Had the railroad been constructed across Main street, where it now is, *on grade*, instead of below grade, there would have been no liability for the incidental, remote damages resulting from the operation of the road. *Heiss v. M. & L. W. R. Co.* 69 Wis. 555; *Trustees v. M. & L. W. R. Co.* 77 id. 158. But the injuries for which damages are sought are no greater or different from the fact that the road passes below grade. Had the city lowered the grade, as it might have done (*Slatten v. D. M. V. R. Co.* 29 Iowa, 155-6; *Murphy v. Chicago*, 29 Ill. 279, 287; *Jamestown v. C., B. & N. R. Co.* 69 Wis. 648; *Oconto v. C. & N. W. R. Co.* 44 id. 231), it would not have been liable for these damages. And if the city had lowered the grade and paid the damages for

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which it was liable, there could be no additional recovery against the company. The liability of the company is no greater than that of the city. *Ottawa, O. C. & C. G. R. Co. v. Larsen*, 2 Law Rep. Ann. 61, and cases cited; *Railroad v. Bingham*, 87 Tenn. 522; *Wilson v. N. Y. C. & H. R. R. Co.* 2 N. Y. Supp. 65; *Egerer v. N. Y. C. & H. R. R. Co.* id. 69; *In re New York E. R. Co.* 36 Hun, 427; *S. C.* 41 id. 502; *Parrot v. C., H. & D. R. Co.* 10 Ohio St. 624; *Penn., S. V. R. Co. v. Walsh*, 124 Pa. St. 544; *Penn. R. Co. v. Lippincott*, 116 id. 472; *New Castle & F. R. Co. v. McChesney*, 85 id. 522.

For the respondent *Bibbs* there was a brief by *Olin & Butler;* and for the other respondents there was a brief by *Lamb & Jones;* and the cause was argued orally by *F. J. Lamb* and *J. M. Olin.*

Cole, C. J. The nature of this action will be learned by reference to 72 Wis. 471, where the case, on a former appeal, is reported. The cause now comes to this court on the question as to what is the proper rule of damages applicable on the admitted facts. This court has often affirmed the rule that the owner whose lands are taken for the use of a railway is entitled to receive the actual value of the land taken, and such other damages as he might sustain to other adjoining property which is directly attributable to the construction, maintenance, and operation of the railway across his land as located. This, in substance, is the rule as stated in *Blesch v. C. & N. W. R. Co.* 48 Wis. 168. This gives the owner the "just compensation for his property taken for a public use," as secured to him by the constitution and law of the state. If the adjoining property is diminished in market value in consequence of the construction of a railroad over a portion of the land, the depreciation is as much an element of the damages for the injury

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or loss as the value of the property actually taken. *Snyder v. W. U. R. Co.* 25 Wis. 60. And this court has likewise held that the lowering by a railroad company of the grade of the highway, in order to adjust such grade to that of its track laid across the highway, was a taking of the property of the owner of the lots abutting on the highway, for which, and for the consequent injury to said lots, the company must make compensation, though the track itself did not encroach upon that part of the highway of which the fee was in the owner. In case the railroad company, in order to perform its legal duty to restore the highway it occupies with its track, is compelled to take and carry away the soil of an adjoining lot, thereby diminishing the market value of the property, compensation must be made to the owner of the property thus taken and injured. *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 408; *S. C.* 60 Wis. 264. The company has no right to make the excavation and grading in the highway for the purposes of a railroad track without making compensation, because it is an imposition of a new burden or servitude upon it. 60 Wis. 273. This is the doctrine of the *Buchner Case*, as laid down and affirmed on both appeals. Indeed, it seems to us that every material question in the case at bar was decided in the *Buchner Case.* The cases are similar in their facts, and are ruled by the same principle of law.

In the case before us, the street in front of the plaintiff's lot was graded down by the company several feet, in order to secure a gradual slope and to restore the street to its former usefulness. A large quantity of earth and soil was removed, and used elsewhere on the track of the company's road. The jury found the value of that part of the lot actually taken by the company, and the extent of the injury or damage to the remainder of the property not taken, occasioned by cutting down and restoring the street in front

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of the lot. The jury further found, as a separate item, the damage done to the lot which was attributable to the operation of the railroad as built.

Now the learned counsel for the company only objects to the last item of damage, which he insists is unjust and should not be allowed. His contention is made notwithstanding the admitted fact that the operation of the road, with other causes, has resulted in diminishing the market value of the property for the full amount found by the jury. It is obvious that the contention of the learned counsel is in flat contradiction with what we have said is the settled rule upon this subject in this state; for, as we have remarked, that rule is: Where a railroad company takes land for the use of its road, it must not only pay for the land actually taken, but must make good the damages to the adjoining property which are directly attributable to the construction and operation of its road across a portion of the land. This is the only true rule, for it makes "compensation go hand in hand with the actual loss or injury sustained by the person whose land is taken." It seems to us that this is the proper measure of redress, and is but making a just compensation to the owner whose property is taken, in conformity to the requirement of the constitution and statute of the state upon the subject. The rule, of course, necessarily implies or means full compensation for the loss or injury, not partial compensation. If the adjoining property is actually depreciated in market value in consequence of the construction and operation of the railroad where it is located, is not the owner entitled to his compensation for this diminished value of his property? We do not think the injury or loss can properly be said to fall within the maxim, *damnum absque injuria.* We are speaking now of a case where property has been taken for the purposes of a railroad, and not one where no land has been taken, but consequential damages result to property

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near the railroad track by the operation of the road; but here a part of the property was actually taken, and the remainder of the property was depreciated in value as a result of such taking. The depreciation in value of the property not taken is as much an element in ascertaining the entire loss the owner has sustained as the value of the land itself which was taken; for otherwise an owner is not compensated for his loss or injury. So, unless the rule as to damages in such cases which has been laid down and acted upon by the court almost from the time of the organization of the state government is wrong, the railroad company must make good the depreciation in the market value of the property not taken which was caused by the construction and operation of this road across the owner's land. This is what is understood to be included or embraced in the word "compensation" as defined by the court; and the word "taking" involves these items of damages, namely, the value of the property taken and the damage to the residue.

But it is said that the land in question was not taken and occupied permanently for railroad purposes, but that there was only a temporary taking, in order to restore the street to its former condition, and that this act would not draw to itself the liability to make good an injury attributable to the operation of the road. We see no ground for making such distinction. It is a verity in the case that the property was injured $2,000 by the cutting down of the street and by the operation of the road. Why should not the company make good this loss to the plaintiffs? The company has taken property for railroad purposes — unless it is a trespasser — and, as we have said, this taking carries with it the obligation of making the compensation which the constitution requires. It matters not what particular act or thing causes the depreciation in the value of the property; if it is occasioned by the taking of a part of the

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land, full compensation for the loss or injury must be made. It seems to us difficult, if not impossible, to separate the effect of the operation of the railroad from other causes which depreciated the value of the property. True, the jury found that the property was depreciated in value $250 by the operation of the road, but this must have been mere conjecture from the facts proven. A person may very well say that in his opinion a piece of property is worth so much before a railroad company has built its road across it, and that after the railroad is built it has depreciated in its market value a given amount; but it is difficult to separate the items of damage, and say so much was caused by this thing and so much by that, though the entire loss or injury may be estimated with reasonable certainty. But there is no difficulty in ascertaining the whole loss or injury to the property in this case, and for that amount compensation must be made under the rule as settled in this state. The learned counsel says that the ordinary and proper operation of the railroad is lawful, and cannot constitute an element of damage; but that rule cannot apply where the railroad takes property for railroad purposes, and injures adjoining property by such taking. Full compensation must then be made for all loss or injury.

We have examined the authorities cited by the learned counsel to sustain his position on this point, and do not think they are applicable to the case at bar. Some of these cases were in the nature of actions on the case for consequential injuries to land incident to the construction and operation of a railroad. They were not condemnation proceedings where the rule implies entire and full compensation for the injury. Consequential injuries to property resulting from the operation of a railroad, such as the annoyance from smoke, noises, cinders, or obstructions to the access of premises, must be distinguished from the direct injury which is caused by the taking of a part of the land

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and the damage to the residue, which falls within the constitutional provision. In the latter case, as we have said more than once, full compensation must be made the owner. The defendant company must answer for the entire depreciation in the market value of the property not taken, under the law of this state.

It follows from these views that the judgment of the circuit court must be affirmed.

By the Court.— Judgment affirmed.

MAIN, Respondent, vs. BOSWORTH and others, Appellants.

October 14 — November 5, 1890.

Judgment: Execution: Registry laws: Bona fide purchaser: Parol trust.

1. A judgment creditor who purchases at his own execution sale in satisfaction of his judgment takes only the actual interest of the judgment debtor in the land so purchased, without regard to the state of the record title.
2. Land was conveyed by a deed absolute on its face, but without consideration, and the grantee, pursuant to a parol agreement, mortgaged it for his own benefit and then reconveyed to the original owner. After the mortgage was given, but before the reconveyance, a judgment against said grantee was docketed and the land was sold under an execution thereon to one of the judgment creditors. *Held*, that the parol trust or agreement to reconvey, having been executed, was valid and might be proved, and that the purchaser at the execution sale obtained no interest in the land.

APPEAL from the Circuit Court for *Outagamie* County.

The action is in equity to remove a cloud upon the title to certain lands of the plaintiff. The case is as follows:

On December 31, 1888, the plaintiff, *W. D. Main*, then being the owner of a certain parcel of land in Outagamie county, which he occupied as his homestead, conveyed the same by deed of warranty to his brother, Gilbert S. Main.

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Such conveyance is absolute on its face. The wife of the plaintiff joined therein. The conveyance was executed without consideration, pursuant to a parol agreement between the parties thereto that the grantee, Gilbert S., should execute a mortgage thereon to secure a loan for $600 for his own benefit, and should then reconvey the land to the plaintiff. Gilbert S. effected the loan, and executed a mortgage therefor on such land. A few days later the defendants *Bosworth*, *Hopkins*, and *Hopkins* (who were partners) filed in the office of the clerk of the circuit court of Outagamie county a transcript of a judgment recovered by them in 1884, in the circuit court of Waupaca county, and issued an execution thereon to the defendant the sheriff of Outagamie county, who levied upon, advertised, and, on May 24, 1889, sold, the land in question under the execution for a sum apparently sufficient to pay the judgment, interest, and costs. The defendant *B. B. Hopkins* was the purchaser at such sale, and a certificate thereof was issued to him, a duplicate of which was duly filed in the office of the proper register of deeds. On June 21, 1889, Gilbert S. Main reconveyed the land to the plaintiff pursuant to such parol agreement. The plaintiff, during the whole time of these transactions, remained in the actual and exclusive possession of the land.

The foregoing facts (and some others not material to the determination of the case) appear from the pleadings, proofs, and findings of the court. The sheriff made no defense to the action. The relief demanded in the complaint is that the execution sale, the certificate thereof, and any apparent lien of the judgment and sale upon the land, be set aside, vacated, canceled, and removed.

A trial of the action resulted in a judgment for the plaintiff for the relief prayed. The defendants *Bosworth*, *Hopkins*, and *Hopkins* appeal from the judgment.

For the appellants there was a brief by *Winkler*, *Flanders*,

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Smith, Bottum & Vilas, of counsel, and *F. C. Weed*, attorney, and oral argument by *C. H. Van Alstine*. They contended, *inter alia*, that a judgment creditor purchasing land at his own execution sale, and as a consideration thereon paying only the amount due on his own judgment with costs of sale, is a purchaser in good faith for a valuable consideration, within the recording act, and is protected thereby. *Ehle v. Brown*, 31 Wis. 405; *Girardin v. Lampe*, 58 id. 267, and cases cited; *Wood v. Chapin*, 13 N. Y. 509; *Barto v. Tompkins Co. Nat. Bank*, 15 Hun, 11; *Hunter v. Watson*, 12 Cal. 363; *Humphrey v. McGill*, 59 Ga. 649; *Dixon v. Cook*, 47 Miss. 226; *Ingram v. Belk*, 2 Strobh. (S. C.), 207; *Wallace v. Campbell*, 54 Tex. 87; *Massey v. Westcott*, 40 Ill. 160; *Gower v. Doheny*, 33 Iowa, 36; *Evans v. McGlasson*, 18 id. 150. A properly recorded certificate of an execution sale is a "conveyance" within the statute of registration. R. S. secs. 2241, 2242; *Drake v. McLean*, 47 Mich. 102. The agreement between the plaintiff and his brother was in the nature of a secret trust, and, resting in parol, is void and cannot be enforced or invoked in aid of either of the parties thereto. The plaintiff is estopped by his deed and by his acts from denying his brother's title to the land. With full knowledge of all the facts he stood by and permitted the property to be sold as his brother's without objection. *Kloety v. Delles*, 45 Wis. 484; *Cooley v. Wilson*, 42 Iowa, 425; *Brothers v. Porter*, 6 B. Mon. 113; *Davis v. Tingle*, 8 id. 542; *Crawford v. Bertholf*, 1 N. J. Eq. 460; *Coil v. Wallace*, 24 N. J. Law, 291, 313; *Rigney v. Smith*, 39 Barb. 383; *Anderson v. Armstead*, 69 Ill. 452; *Higgins v. Ferguson*, 14 id. 269; *Winchell v. Edwards*, 57 id. 41; *Continental Nat. Bank v. Nat. Bank*, 50 N. Y. 575; 4 Kent's Comm. 261, note *b; Cox v. Buck*, 3 Strobh. 367.

John Bottensek, for the respondent, argued that parol evidence was properly admitted to prove the purpose for which

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the plaintiff deeded the land to his brother, and that the reconveyance related back to the date of that deed. *Karr v. Washburn*, 56 Wis. 303; *Lefferson v. Dallas*, 20 Ohio St. 68; *First Nat. Bank v. Bertschy*, 52 Wis. 438; *Wells v. Benton*, 108 Ind. 585. When the transcript was filed and docketed G. S. Main had no right or interest in the land which became subject to the lien of the judgment. 2 Pomeroy, Eq. Jur. sec. 721; Freeman, Judg. sec. 357; *Goodell v. Blumer*, 41 Wis. 436; *Ells v. Tousley*, 1 Paige, 280; *Morris v. Mowatt*, 2 id. 586; *Brown v. Pierce*, 7 Wall. 205, 218; *Baker v. Morton*, 12 id. 150; *Arnold v. Patrick*, 6 Paige, 310, 315. The defendant *B. B. Hopkins* was not a purchaser in good faith at sheriff's execution sale, because: (1) The plaintiff was and remained in the actual, open, continuous occupancy and possession of the land for years next preceding and to the trial of this action. *Bull v. Bell*, 4 Wis. 54; *Wicke v. Lake*, 21 id. 410; *McClellan v. Scott*, 24 Wis. 81; *Ehle v. Brown*, 31 id. 405, 413; *Cunningham v. Brown*, 44 id. 72. (2) Said defendant is one of the judgment creditors and purchased on sale under his judgment, paid no new consideration, and parted with no right or advantage by the sale and purchase. Freeman, Judg. sec. 366*a*; *Cary v. White*, 52 N. Y. 128; 2 Am. & Eng. Ency. of Law, 444. The rule of estoppel contended for by the defendants cannot apply here because neither of them was influenced or governed in his actions by the silence or absence of the plaintiff.

Lyon, J. If the judgment of the appellants became a lien upon the land in question on filing the transcript thereof in Outagamie county, it was only a lien upon the actual interest therein of Gilbert S. Main, the judgment debtor. Hence it is necessary to determine what that interest was. This question is not affected by the registry laws, for a judgment creditor who purchases at his own execution sale in satisfaction of his judgment takes only the actual interest

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of the judgment debtor in the land so purchased, without regard to the state of the record title. The lien of a judgment which the statute gives (R. S. sec. 2902) is upon the real property of the judgment debtor in the county in which the judgment is docketed, not upon the real property therein the title to which appears by the records in the proper offices to be in such debtor. An apt illustration of this is found in the present case. The mortgage for $600 on this land, executed by Gilbert S. Main, was not recorded until after the transcript of appellant's judgment had been duly filed in Outagamie county, yet it is not claimed here that the lien of the judgment is paramount to such after-recorded mortgage. For the same reason, the question of the interest of the judgment debtor in the land is not affected by the existence or absence of knowledge by the appellants, or notice to them, whether actual or constructive, of the parol trust or agreement to reconvey, pursuant to which the plaintiff and his wife conveyed the land to the judgment debtor, and he reconveyed the same to the plaintiff. Were this otherwise, probably the fact that the plaintiff never parted with the actual possession of the land would be sufficient to charge the appellants with constructive notice of the parol trust under which the judgment debtor held the legal title thereto.

The controlling question is, therefore, Had the judgment debtor any interest in the land when the transcript was filed in Outagamie county, upon which the appellants' judgment became a lien, or which was subject to seizure and sale on the execution issued thereon? The question is not burdened with any considerations of fraud, for none is charged or intimated against any of the parties. The parol trust is valid at common law, and but for the statute of frauds (R. S. sec. 2302) might be enforced in equity. Because of the statute it cannot now be thus enforced, yet it is not a nullity. While Gilbert S. Main could not be com-

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pelled to execute the trust by reconveying the land to plaintiff, yet he was under the strongest moral obligation to do so. To the extent of such obligation, plaintiff was the equitable owner of the land when the transcript of appellants' judgment was filed in Outagamie county, the judgment debtor holding only the naked legal title in trust for the plaintiff. Had the trust been created by a writing duly signed, the judgment debtor would have had no interest in the land which could have been reached by the appellants' judgment and execution.

But the trustee, in the discharge of his moral obligation to do so, has reconveyed the land to the plaintiff — thus executing the parol trust. We think this conveyance, although executed after the transcript was filed in Outagamie county, cures the failure to create the trust in writing duly signed and places the plaintiff in the same position as though it had been so created, which, as a matter of course, includes the right to make proof of the parol trust thus executed. The only risk the plaintiff incurred by allowing the trust to rest in parol was that the trustee might dishonestly refuse to execute it. This doctrine is fairly deducible from the opinions and judgments of this court in *Karr v. Washburn*, 56 Wis. 303; *First Nat. Bank v. Bertschy*, 52 Wis. 438; *Goodell v. Blumer*, 41 Wis. 436. Those cases may differ from this case in some of their features, yet the principles there asserted are applicable here, and rule this case. Nothing need be added to what is said in the opinions therein.

By the Court. — The judgment of the circuit court is affirmed.

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OLSEN and another, Respondents, vs. THOMPSON, Guardian, Appellant.

October 14 — November 5, 1890.

GUARDIANS: FINAL ACCOUNTING. (*1–3*) *Charges for support of wards: Evidence.* (*4*) *Orders on annual accounts: Estoppel: Evidence.* (*5*) *Interest.*

1. Charges by a guardian of minor children for the support of his wards prior to his appointment as such guardian are only allowed when there are the strongest equities in favor thereof.
2. Minor children having no estate were taken into the family of their mother's brother-in-law. Two years later a small amount of money was left them by their grandfather, and the said brother-in-law was appointed their guardian. Upon evidence tending to show, among other things, that when the children entered his family it was understood between him and their mother that no charge was to be made for their board, it is *held* that charges by said guardian for their board prior to his appointment were properly disallowed.
3. Said guardian having been allowed, on his final accounting, for the board of his wards after his appointment, at the rate charged therefor in a previous account rendered by him, this court declines, upon the evidence, to hold such allowance insufficient.
4. Orders made by the county court upon the examination of annual accounts rendered by a guardian are not an estoppel against him at the final accounting (County Court Rule X, sec. 10), but are admissible in evidence, in connection with said accounts, to show the character of the claims made by him.
5. A guardian is chargeable with interest on the balance of the estate in his hands.

APPEAL from the Circuit Court for *Outagamie* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

The facts in this case are substantially as follows: In 1861, Mathias Olsen died intestate, leaving the respondents, his children. *Julia* was then one year old, and *Martha* less than two years old. Mathias left no estate, and no administrator of his estate was appointed. On October 30, 1866, it was known that the grandfather of the respondents had left

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them a small sum of money, and on that day the appellant was duly appointed guardian of said minor children. Afterwards, in 1867, as such guardian, he received the money left by their grandfather, amounting to the sum of about $440. In 1869 the appellant filed in the office of the county judge an account as guardian, and again in 1872 he filed another account in said county court. The county court rejected and disallowed all the items of credit in said accounts so filed, excepting the sum of $12.22. No appeals were taken from the action of the county court in regard to these accounts by the appellant, and perhaps no appeal was allowable, or necessary to protect the rights of either party. Nothing further was done in regard to the guardianship of the appellant until June, 1886, when, upon the application of the respondents, the county court of Brown county cited the appellant to appear before that court and render a final account of his guardianship. In pursuance of said citation the appellant appeared before said county court, and rendered an account as such guardian, and after hearing the evidence of the respective parties the county court made the following order and judgment therein:

"On the 1st day of June, 1886, at a term of the county court, the said minors being represented by their attorneys, Messrs. Hudd & Wigman, and the guardian by his attorney, H. J. Huntington, after hearing proofs and allegations, the court found (1) that the guardian was duly appointed, and accepted the trust by giving bond in the sum of five hundred dollars, with Casper Hansen as surety, which bond was accepted and approved October 30, 1866; (2) that on the 1st day of May, 1869, *Thompson*, as guardian, presented to said court his account, which was on the 7th day of February, 1870, duly examined and passed on by the court; (3) that said *Julia* arrived at full age January 23, 1881, and said *Martha*, July 28, 1882, when they each became entitled to a full accounting by said guardian,— and ordered and

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adjudged that *Thompson* render a full account of his guardianship on or before June 15, 1886, and that the same be for examination and settlement at 11 o'clock A. M. on said day, and that five days' notice of same be given him."

On June 15, 1886, at a term of the said county court, an order was entered reciting the appearance of both parties, the presence and examination of the guardian, and the following findings: *First.* That the amount properly chargeable to said guardian July 28, 1882, the date at which the youngest ward came of age, was $767.15; *second*, that the amount properly allowed and credited to him as of the date last aforesaid is $252.19; *third*, that the residue in his hands consists of money amounting to $514.96, as per Schedule A, hereto annexed; *fourth*, that the said *Julia* and the said *Martha* are entitled to said residue. Wherefore it is ordered and adjudged that the account of the guardian, as stated herein, be, and the same is hereby, approved and allowed. That the residue, $514.96, be assigned as follows: To *Julia*, $257.48, and to *Martha*, $257.48, each of said sums to bear interest from July 28, 1882, at 7 % per annum until paid. And that on payment of said sums the guardian be discharged.

From this judgment the guardian appealed to the circuit court of Brown county. The case was then removed to Outagamie county, and was there retried before a referee appointed by the court to hear, try and determine the same. The referee made his report and judgment, and thereby found the same amount due from the guardian to the respondents as was found by the county court.[1] The

[1] The findings of fact by the referee were substantially as follows: (1) That the guardian received, May 28, 1867, $444 belonging to the children; (2) that a credit should be allowed him, as per the order of the county judge, February 7, 1870, $12.22, and his five per cent. commission, $22.20 — total $34.42, leaving a balance in his hands of $409.58; (3) that the interest on said balance to July 28, 1882, when the youngest ward became of age, is $357.57; (4) that the total amount chargeable against

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circuit judge affirmed the finding and judgment of the referee in all respects, and from the judgment of the circuit court the guardian appeals to this court.

F. C. Cady, for the appellant.

For the respondent there was a brief by *Hudd & Wigman*, and oral argument by *T. R. Hudd.*

TAYLOR, J. The only matter in controversy between the parties in this case is whether the guardian should have been allowed more than the sum of $96 for board of said infant children while they lived with him, from 1864 to 1868. The evidence shows that the children lived in the family of the guardian from August 10, 1864, to September 4, 1868. In his account rendered to the county court the appellant made a charge as follows: "By expenses and services in caring for, clothing, and boarding said minors from August 10, 1864, to September 4, 1868, at $1 per week for each, 211½ weeks, $423." This item of the account was contested by the respondents, and he was allowed but $96 on the same, being the sum of fifty cents per week for each of the minors from the date of his appointment, October 30, 1866, to September 4, 1868, when said minors left the family of the guardian, and returned to their mother, who thereafter cared for them.

The evidence shows that the guardian was the husband of the sister of the mother of the minors, and it tends to show at least that, when the children were taken into the family of the guardian, it was understood between the mother and the guardian that there was to be no charge made by him for their board. It also tends to show that

the guardian at that date is $767.15; (5) that the guardian is entitled to the following credits: attorneys' fees, $42.50; board of wards ninety-six weeks at fifty cents per week for each, $96; interest on the last item to July 28, 1882, $83.21; attending court four times, $12.00; commission on $357.57, $17.88 — total credits, $252.19; leaving due from the guardian, July 28, 1882, $514.96.— REP.

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he did not furnish them any clothing. The evidence also tends to show that when he was appointed guardian for the purpose of receiving the money left to the infants by their grandfather, the appellant stated to the mother that the interest on the money would clothe and school them so long as they remained with him, and it appears that he neither clothed nor schooled them while they lived in his family. It is urged by the appellant that, if he was entitled to anything for the board of his wards, he was entitled to recover more than was allowed to him, and that he should have been allowed for the board of the children from the time they first came into his family, August 10, 1864, down to the time of his appointment as their guardian, October 30, 1866, as well as from the date of his appointment.

We do not think the facts in this case are of such a character as to justify a court of equity in making any such allowance. It is evident to us that, had the mother supposed any such charge was to be made by her brother-in-law, she never would have consented to his appointment as their guardian for the purpose of receiving the small patrimony left to them by their grandfather, and that she would have found some way of supporting her infant children without applying a large share of it to the payment for their board while living with their uncle, when she had every reason to believe that no charge for board had been intended when they were taken into his family. Such charges for support previous to the guardian's appointment are only allowed when there are the strongest equities in favor thereof. *In re Besondy*, 32 Minn. 385; *Villard v. Robert*, 49 Am. Dec. 654, and cases cited in note on page 660. We find nothing in this case which entitles the guardian to any such allowance.

It is also urged that enough was not allowed for the board during the time he was guardian and while the infants lived with him. That was a question of fact to be deter-

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mined by the court below. The allowance was probably fixed at that amount because the guardian in his account rendered to the county court in 1872 charged at that rate for their board. Under many of the authorities, no allowance should have been made to the guardian for the support of his wards beyond the annual interest upon the estate in his hands. See *Villard v. Robert*, 49 Am. Dec. 654, and *Beeler v. Dunn*, 49 Am. Dec. 761, 3 Head, 87. And when the guardian claims for the board of his infant wards when they are living in his family, without first obtaining an order from the court to use the principal of their estate to pay for such board, he must make a case which appeals strongly to the equity powers of the court. The learned circuit judge refused to interfere in this case, because he thought he ought not to interfere, because the board was furnished without first obtaining an order of the court permitting him to use the principal of the estate for that purpose; and, although we are of the opinion that in a proper case the court might allow for such support out of the body of the estate without first obtaining an order for that purpose, we are not satisfied that the facts in this case would justify such an allowance, and, had the trial court refused to allow anything beyond the interest of the estate in payment for their board in this case, we should have felt constrained to affirm such decision.

While we are of the opinion that the orders of the county court made in this matter were not an estoppel against the defendant in this action, we think they were properly received in evidence for the purpose of showing the character of the claims made by the defendant in regard to this matter. Whether the decision of the county court allowing or disallowing any items of a guardian's annual account when made and passed upon by said court as required by sec. 3972, R. S., would be conclusive upon the guardian or ward if not appealed from, were it not for sec. 10, Rule X, of the county

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court rules, need not be determined. Said sec. 10 of the rules declares that "no order of the court in reference to any annual account of the guardian shall be conclusive upon the final settlement of the guardian's accounts, but upon such final settlement it shall be competent to examine and pass upon all the guardian's accounts subsequent to the time of his appointment." This rule must be held to be an authoritative declaration as to the effect which shall be given to the orders of the county courts made under said sec. 3972. See, also, *Willis v. Fox*, 25 Wis. 646.

There can be no doubt but that the guardian should be charged with interest on the balance of the estate in his hands. *In re Thurston*, 57 Wis. 104.

By the Court.— The judgment of the circuit court is affirmed.

SMITH, Appellant, vs. SHAWANO COUNTY and others, Respondents.

October 15 — November 5, 1890.

Appealable orders.

1. An order modifying certain findings of fact and conclusions of law in a manner different from that asked, and refusing to modify others, is not appealable.
2. An order taxing or retaxing costs is not appealable.

APPEAL from the Circuit Court for *Shawano* County.

The facts are sufficiently stated in the opinion.

For the appellant there were briefs by *Silas Bullard*, attorney, and *Lewis, Pfund & Briggs*, of counsel, and oral argument by *H. M. Lewis*.

For the respondents there was a brief by *M. J. Wallrich* and *Geo. G. Greene*, and oral argument by *Mr. Greene*.

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ORTON, J. The object of this action is to have certain taxes and tax certificates declared void and the certificates canceled. The court made certain findings of fact and conclusions of law by which some of said taxes were found to be void, and certain of said taxes were found to be legal and valid. To such findings of fact and conclusions of law as were adverse to the plaintiff, he filed exceptions. He then moved the court to modify the same. The court denied the motion except as to the sixth and seventh conclusions of law, and as to them the court modified the same, but not in accordance with the motion, and entered an order accordingly. The plaintiff has appealed to this court from said order. The appeal is therefore substantially from such modification of the sixth and seventh conclusions of law, and from the refusal of the court to modify the findings of fact and conclusions of law according to the motion. A part only of the findings of fact and conclusions of law is involved in the appeal.

The respondent moves to dismiss the appeal, on the ground that the order is not appealable. On account of the importance of the case, and the trouble and expense to which the parties have already been put, we regret that we are compelled to grant the motion and dismiss the appeal. The order is so clearly not appealable that our decision of the questions raised and so ably argued on the appeal would be nugatory. The order is a mere rule of practice during the progress of the trial. The motion was an attempt of the plaintiff to obtain from the court such findings of fact and conclusions of law as would support and require a judgment in his favor, and to settle and determine what they should be. An appeal from that part of the order denying the motion is indirectly an appeal from the findings of fact and conclusions of law, and from that part modifying two of the conclusions of law is even more directly an appeal from them so modified, and such an appeal will not lie. *Webster-Glover L. & M. Co. v.*

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St. Croix Co. 63 Wis. 647. It is not appealable, if for no other reason, because it does not prevent "a judgment from which an appeal might be taken." Sec. 3069, R. S. In *Bourgeois v. Schrage*, 69 Wis. 316, an appeal from an order confirming the findings and report of a referee was held not to lie for the same reason that obtains here,— that the order merely constitutes them the findings of the court. An order for judgment is not appealable (*Murray v. Scribner*, 70 Wis. 229); nor an order sustaining objection to any evidence under the complaint, and dismissing the complaint on that ground (*Johannes v. Youngs*, 42 Wis. 401, and *Nevil v. Clifford*, 51 Wis. 483); nor an order denying a motion for judgment in one's favor (*Treat v. Hiles*, 75 Wis. 265). The proper practice in such cases is to except to the rulings, and appeal from the judgment. The plaintiff in this case excepted to the findings of fact and conclusions of law which he moved to have modified.

The learned counsel of the appellant suggests that the order involves the costs in the case. That would make no difference, for that also is a part of the findings. An order taxing or retaxing the costs is not appealable, because it is before judgment. *McHugh v. C. & N. W. R. Co.* 41 Wis. 79.

By the Court.— The appeal is dismissed.

WARNER, Respondent, vs. MICHELSTETTER, Appellant.

October 15 —November 5, 1890.

New trial: Misapprehension of law: Appeal.

To justify the reversal of an order granting a new trial on the ground that it was based upon a misapprehension of law, such misapprehension should appear in the order itself.

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APPEAL from the Circuit Court for *Outagamie* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It appears from the record that this is an action for money had and received by the defendant as agent for the plaintiff in the sale of lands; that the defense is a general denial and new matter alleged; that, June 23, 1889, a judgment was rendered in justice's court in favor of the plaintiff; that, October 14, 1889, a verdict was rendered in the circuit court, on appeal, in favor of the defendant; that, October 26, 1889, the plaintiff moved the court upon the minutes, records, pleadings, files, and proceedings in said cause to set aside said verdict and grant a new trial on eight grounds specifically named; that, November 8, 1889, the court made an order thereon, without reciting therein any ground for the same, setting aside said verdict and granting a new trial; that, January 9, 1890, the defendant appealed from said order to this court; that, July 12, 1890, the judge of said court signed a bill of exceptions wherein it is stated in effect that in granting said motion for a new trial the said court held that in giving the instructions to the jury the letter of the defendant and wife to the plaintiff, dated April 15, 1889, in evidence, was overlooked by the court, and that the court should, in the said instructions to the jury, have more particularly called the jury's attention to the contents of said letter, and that, because the court had not done so, the verdict ought to be set aside and a new trial granted; that said order was made for that reason, and for none other.

Humphrey Pierce, for the appellant.

For the respondent there was a brief by *Henry D. Ryan*, and the cause was argued orally by *W. S. Warner*, the respondent, in person.

CASSODAY, J. The motion for a new trial upon the grounds therein stated was very much within the discretion

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of the trial court. An order granting such new trial will not ordinarily be disturbed unless it is apparent from the record that there has been an abuse of such discretion. It does not so appear in the case at bar. The only exception to the rule is when it affirmatively appears from the record that such order is based upon a misapprehension of the law applicable. *Mullen v. Reinig*, 68 Wis. 410. When such misapprehension exists and is relied upon, it is usually made to appear in the order itself, and in fact should so appear. The order before us for review reveals no such misapprehension. For aught that appears in the order, it may have been granted upon any of the eight grounds specified in the motion. Had the trial court denied that motion, the plaintiff might have appealed from any order made thereon, within the statutory period. But the court granted the motion, and two months thereafter, and on January 9, 1890, the defendant appealed from the order made thereon. More than eight months after making the order, the trial judge settled and signed a bill of exceptions purporting to state the only ground upon which he granted the motion as mentioned in the foregoing statement. The ground so stated is not among those enumerated in the motion. No such order upon such ground was asked for by the plaintiff. It may be questionable whether the order could be sustained upon that ground. It is enough here to know that the practice of making such misapprehension of law appear by bill of exceptions instead of in the order itself is contrary to the repeated decisions of this court. *Rogers v. Hœnig*, 46 Wis. 361; *Webster v. Oconto Co.* 47 Wis. 227; *Mullen v. Reinig*, 68 Wis. 410. As indicated in the first of these cases by Mr. Justice OXTON, the order is without qualification or reservation, and must therefore be held to be conclusive until modified in some proper way. Even such statement of the trial judge in the bill of exceptions cannot be imported into the order, nor have the effect of changing,

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modifying, or impeaching it. Especially should this be so, where, as here, the ground embodied in such statement is outside of those enumerated in the motion.

By the Court.— The order of the circuit court is affirmed.

BAILEY, Respondent, vs. O'DONNEL, Appellant.

October 15 — November 5, 1890.

Replevin: Evidence: Record of suit inter alios: *Appeal.*

1. In replevin for a horse it appeared that one M., being the owner thereof, had mortgaged it to one S. to secure the performance of a contract. After the contract had been fully performed, M. mortgaged the horse to one G. Subsequently S. took the horse from M. in an action of replevin, and sold it under his mortgage to the plaintiff; and thereafter G. took it from the plaintiff under his mortgage, and sold it to the defendant. *Held*, that the record and papers in the replevin suit of S. against M. were not admissible in evidence against the defendant in this action.
2. There being no evidence other than such record and papers which would sustain the verdict for the plaintiff, the admission thereof was a material error.

APPEAL from the Circuit Court for *Forest* County.

Replevin. The facts will sufficiently appear from the opinion. The defendant appeals from the judgment entered upon a verdict in favor of the plaintiff.

For the appellant the cause was submitted on the brief of *Levi J. Billings.*

Egbert Wyman, for the respondent.

COLE, C. J. This is an action of replevin for the possession of a horse. The plaintiff clams to have bought the animal of one Chauncy Spaulding at a public sale. Spaulding derived title under a bill of sale given to him by one J. C. Miner, dated January 5, 1889. This bill of sale, though

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absolute in its terms, was filed as a mortgage, and was treated by the court as such on the trial. Spaulding left the property in the possession of Miner until November 2, 1889, when he caused the horse to be taken in an action of replevin commenced by him against Miner before a justice of the peace. It was by the proceedings in that action that Spaulding obtained possession of the horse, and then sold it to the plaintiff in this suit. But the horse was taken from the plaintiff's possession in three or four days, under a chattel mortgage which included the animal and other property, which chattel mortgage was given by Miner to one Graef, dated May 7, 1889. This mortgage is in the usual form of such instruments, and was filed in the proper office the day of its date. There is nothing in the case which tends to impeach the good faith or validity of this mortgage. It was given to secure the payment of a *bona fide* debt which the mortgagor, Miner, owed the mortgagee, Graef. About this there is no question made. It is insisted that the title to the horse derived under this mortgage must prevail as against any title which Spaulding acquired under his bill of sale.

It is not necessary in this case to decide whether the bill of sale of personal property, absolute on its face, may be filed as a chattel mortgage, and have the effect of a mortgage so far as subsequent purchasers and incumbrancers of the mortgaged property are concerned. This was not a conditional sale of the horse, where the title was to remain in the vendor and the possession in the vendee until some condition was complied with, so as to authorize it to be filed under sec. 2317, R. S. It was undoubtedly intended by the parties to it to be in the nature of a mortgage to secure the performance of a logging contract which Miner had entered into with Spaulding, December 15, 1888, on which Spaulding had advanced some money. It is only necessary to observe, in regard to this logging contract,

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that the undisputed testimony shows that it had been fully performed by Miner, and that Spaulding's debt, growing out of it, had been paid and satisfied before Miner gave the chattel mortgage to Graef.

We think the court should have granted the motion for a nonsuit, on the ground that the plaintiff failed to show title or the right of possession of the horse under the bill of sale in question, as against the defendant. But the case is not reversed for that reason, but for another, which will be now stated.

On the trial, the record and papers in the case of *Spaulding v. Miner* were introduced in evidence against the objection of the defendant. The object of this testimony was to prove title to the horse in the plaintiff; but it is obvious that this record was in a proceeding *inter alios acta*, and cannot affect the parties to this suit. That it was improper testimony is too plain to admit of discussion. The learned counsel for the plaintiff insists that the judgment should not be reversed because of the admission of this improper testimony, since, as he says, there is other evidence in the case sufficient to sustain the verdict for the plaintiff. We cannot agree with counsel upon this point. Treating the bill of sale as in the nature of a chattel mortgage given to secure the performance of the logging contract, when that logging contract was performed the bill of sale was *functus officio*. It had performed its office, and could not be invoked to sustain the title of Spaulding to the horse in controversy; hence the foundation of the plaintiff's title derived under the bill of sale falls to the ground. So the admission of the record might have been, and doubtless was, very prejudicial to the defendant, and must have had a controlling weight with the jury in finding that the plaintiff was the owner of the horse and entitled to the possession of the same. The jury must have supposed that the title of Spaulding had

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been determined in this action against Miner, and found in favor of the plaintiff on that theory. Be this as it may, it is apparent the record was improperly admitted and was well calculated to injure the defendant. Without considering the error assigned on the charge, we therefore reverse the judgment because of the admission of improper evidence, and remand the cause for a new trial.

By the Court.— It is so ordered.

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1. Two of three heirs having each brought actions to charge the representative of the administrator of the estate of their ancestor, and one who had been the business partner of said administrator, separately, with the profits arising from their dealings with the lands of said ancestor, and it appearing that each cause of action arose out of the same transactions and that the rights of all parties could be fully protected in a single action, the court properly ordered that all four actions be consolidated and, on motion of the third heir, that he be made a party to the consolidated action. *Biron v. Edwards. Biron v. Scott,* 477

2. The power of a court of equity to consolidate actions does not depend upon any statute for its existence. *Ibid.*

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ADMINISTRATORS AND EXECUTORS. See ESTATES OF DECEDENTS. WILLS.

ADULTERATION in foods, etc. See FORFEITURES, 1.

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AMENDMENT of pleading. See PLEADING, 1.

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ANSWER. See MORTGAGES, 1. PARTIES. PARTNERSHIP, 2. PRACTICE, 1. RAILROADS, 1. SALE OF CHATTELS, 8.

ANTENUPTIAL AGREEMENT. See HUSBAND AND WIFE, 2-4.

APPEAL.

To Supreme Court. See APPEALABLE ORDER. BILLS AND NOTES, 4. COSTS, 3. CRIMINAL LAW, 1, 2. INSTRUCTIONS TO JURY, 5. LIBEL, 9. NEW TRIAL.

1. Where there is no bill of exceptions this court will assume that there was evidence sustaining all the findings of fact by the trial court and disproving all inconsistent inferences. *Morrow v. Lander,* 77
2. A certificate to a bill of exceptions regularly signed by the judge, that "the above and foregoing was and is all the testimony given on the trial of the above-entitled action," is sufficient. *Muetze v. Tuteur,* 236
3. An erroneous statement by plaintiff's counsel, at the commencement of the trial, as to the nature of the action, which did not mislead the defendant, is not ground for reversal of the judgment. *Lee v. Campbell,* 340
4. Where the bill of exceptions is not certified by the trial judge to contain all the evidence, it will be presumed that every fact pleaded which is essential to support the judgment was proved on the trial. *Ibid.*
5. An exception to the whole of the charge to the jury is too general to be available on appeal. *Smith v. Coleman,* 343
6. The right to appeal from an order is waived by a party who accepts the costs awarded to him as the condition upon which the order was granted. *Ibid.*

From Justices' Courts.

7. Upon appeal to the circuit court, if there is no trial *de novo,* the verdict of the jury in a justice's court must stand, unless it is clearly unsupported by the evidence. *Johnson v. Borson,* 593

APPEALABLE ORDER.

See APPEAL, 6.

1. An order modifying certain findings of fact and conclusions of law in a manner different from that asked, and refusing to modify others, is not appealable. *Smith v. Shawano Co.* 672
2. An order taxing or retaxing costs is not appealable. *Ibid.*

APPLICATION of payments. See SURETYSHIP, 3.

ARBITRATION. See INSURANCE, 6.

ASSIGNMENT.
For benefit of creditors. See SETOFF. VOLUNTARY ASSIGNMENT.
Of partnership claim. See PARTNERSHIP, 3.

ATTORNEYS AT LAW. See CRIMINAL LAW, 3.

BANKS AND BANKING. See SETOFF.

BILL OF EXCEPTIONS. See APPEAL, 1, 2, 4. CRIMINAL LAW, 1, 2.

BILL OF PARTICULARS. See SALE OF CHATTELS, 3.

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BILLS AND NOTES.

See ESTATES OF DECEDENTS, 2.

1. In an action by a bank against accommodation indorsers of notes, it appeared, among other things, that after maturity thereof the maker paid interest thereon for ninety-three days in advance. He testified that the plaintiff's cashier had agreed to extend the time of payment if the interest was paid in advance. Upon such payment being made the dates upon the backs of the notes, showing the times when they became due, were changed to the dates to which interest was so paid, and the notes were placed with others becoming due at those times, and no demand of payment was made until about those dates. The cashier testified that he had told the maker that if he wanted an extension he must get new notes indorsed by the same parties, and that he did not intentionally extend the time. The indorsers had no knowledge of and did not consent to any extension. *Held*, that the evidence did not warrant a verdict against the indorsers, it appearing that there had been an extension which released them. *Batavian Bank v. McDonald*, 486

2. In an action upon a promissory note purporting to have been executed by defendant's intestate, R., who signed by making his mark, the payee's daughter testified that two indorsements of payments thereon were made by her at the request of both R. and her father. Another witness testified that he assisted at an attempted settlement between R. and the payee, and that a note of R. was then presented by the payee, which he believed to be the one now in suit. *Held*, that the evidence of the execution of the note by R. was sufficient to support a verdict for the plaintiff. *Williams v. Riches*, 569

3. The payee's daughter having been only ten years old when she wrote the first indorsement, and thirteen years old when she wrote the second, it was not error to refuse to compel her to rewrite the indorsements for comparison at the trial, she being then twenty-one years old and having testified that her handwriting had very much changed and improved. *Ibid.*

4. In an affidavit for a continuance the plaintiff had stated that he could not safely go to trial without the testimony of one W. H., whom he believed to have made the second indorsement on the note. This affidavit was offered as evidence by the defendant, but was rejected. The father of W. H. testified that the plaintiff had told him, prior to the trial, that W. H. made one of the indorsements. The plaintiff testified that he did make such statement; that he was induced to do so from comparing W. H.'s handwriting with the indorsements, but knew nothing about the fact; and that he was afterwards informed that the payee's daughter made the indorsements. *Held*, that the exclusion of the affidavit was not error for which the judgment would be reversed. *Ibid.*

BOND of assignee: Approval. See VOLUNTARY ASSIGNMENT, 3.

BOND of county clerk: Action for breach. See PARTIES.

BURDEN OF PROOF. See PLEADING, 2. RAILROADS, 1. VENDOR, ETC. OF LAND, 2.

CARRIERS. See RAILROADS, 6.

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CASES DISTINGUISHED, ETC.

1. *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141 (as to negligence of third persons), distinguished. *Blazinski v. Perkins,* 12

2. *Brill v. Ide's Estate,* 75 Wis. 113 (as to claims against estates of decedents), distinguished and questioned. *Austin v. Saveland's Estate,* 108, 112

3. *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, 60 id. 264; *Shealy v. C., M. & N. R. Co.* 72 id. 471 (as to taking of land), distinguished. *Trustees v. M. & L. W. R. Co.* 161–2

4. *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, 60 id. 264 (as to taking of land), followed. *Shealy v. C., M. & N. R. Co.* 656

5. *Bushnell v. Scott,* 21 Wis. 457; *Jones v. Evans,* 28 id. 168; and *Duffy v. C. & N. W. R. Co.* 34 id. 188 (as to new trial), distinguished. *Kittner v. M. & N. R. Co.* 3

6. *Duffy v. C. & N. W. R. Co.* 34 Wis. 188. See No. 5.

7. *Emmons v. Sheldon,* 26 Wis. 648; *Whitney v. Milwaukee,* 65 id. 409 (as to inadequate damages), distinguished. *Robinson v. Waupaca,* 546

8. *Gilbank v. Stephenson,* 31 Wis. 592 (as to what constitutes a partnership), distinguished. *La Flex v. Burss,* 541

9. *Golden v. Glock,* 57 Wis. 118 (as to sale of standing timber), followed. *Hicks v. Smith,* 148, 150

10. *Haben v. Harshaw,* 49 Wis. 379 (as to partnership liability), distinguished. *Cribb v. Morse,* 328

11. *Heddles v. C. & N. W. R. Co.* 74 Wis. 239 (as to precautions at railway crossing), distinguished. *Winchell v. Abbott,* 377

12. *Herbst v. Lowe,* 65 Wis. 316 (as to ignorance of contents of written instrument), distinguished. *Warder, B. & G. Co. v. Whitish,* 433

13. *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159; and *Schumitsch v. Am. Ins. Co.* 48 id. 26 (as to indivisible contracts), distinguished. *Loomis v. Rockford Ins. Co.* 89

14. *Hubbard v. Lyndon,* 28 Wis. 674 (as to town orders), distinguished. *Brown v. Jacobs,* 30

15. *Jones v. Evans,* 28 Wis. 168. See No. 5.

16. *Lindsay v. Guy,* 57 Wis. 200 (as to approval of bond of assignee), distinguished. *Shakman v. Schlueter,* 404

17. *Mills v. Gleason,* 11 Wis. 470 (as to ratification), distinguished. *Dullanty v. Vaughn,* 42

18. *Schumitsch v. Am. Ins. Co.* 48 Wis. 26. See No. 13.

19. *Shealy v. C., M. & N. R. Co.* 72 Wis. 471. See No. 3.

20. *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167 (as to donations to railroads), followed. *Ellis v. N. P. R. Co.* 118–120

21. *Whitney v. Milwaukee,* 65 Wis. 409. See No. 7.

22. *Willis v. Bremner,* 60 Wis. 622 (as to partnership liability), followed. *Cribb v. Morse,* 328

23. *Winner v. Hoyt,* 66 Wis. 227 (as to voluntary assignment), distinguished. *Cribb v. Hibbard, S. B. & Co.* 204–210

24. *Winninghoff v. Wittig,* 64 Wis. 180 (as to consolidation of actions), distinguished and limited. *Biron v. Edwards,* 486

25. *Winstanley v. C., M. & St. P. R. Co.* 72 Wis. 375 (as to precautions at railway crossing), a suggestion negatived. *Winchell v. Abbot,* 375

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CAUSE OF ACTION. See ACTION.

CHANGE OF VENUE. See CRIMINAL LAW, 6–9. JURISDICTION, 8.

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHARIVARI. See CRIMINAL LAW, 14.

CHATTEL MORTGAGES.

See DEBTOR AND CREDITOR. EVIDENCE, 10, 11. PARTNERSHIP, 1. VOLUNTARY ASSIGNMENT, 1.

1. It was stipulated that the mortgagor, at the request of the mortgagee, delivered a chattel mortgage to the proper town clerk, "who took the same into his possession and filed it as of that day," making the entries required by subd. 10, sec. 832, R. S. *Held*, that the mortgage was duly filed, within the meaning of sec. 2314, R. S. *Marlet v. Hinman*, 136

2. A chattel mortgage which has been duly filed is valid as against a subsequent *bona fide* purchaser of the property, although prior to his purchase the mortgage has disappeared from the files through the negligence or misconduct of the town clerk. *Ibid.*

CITIES. See RAILROADS, 2, 4. WATERCOURSES, 1, 3.

CIVIL DAMAGES for death. See DAMAGES, 1, 6, 7. DEATH. PHYSICIANS AND SURGEONS.

CLAIMS against decedents. See ESTATES OF DECEDENTS, 1, 2.

CLERICAL ERRORS. See COSTS, 3.

CLOUD UPON TITLE. See EQUITY.

CO-EMPLOYEES. See MASTER AND SERVANT, 4, 9.

COMMON CARRIERS. See RAILROADS, 6.

COMMON SCHOOLS.

See TOWNS, 6.

In an action against a town board of school directors upon orders drawn upon the town treasurer for debts incurred for school purposes, and made payable "out of any moneys in the school fund not otherwise appropriated," the complaint need not allege that there are moneys in such fund out of which the orders could be paid. Such orders are not payable out of a special fund, and the presumption is that the school officers have performed their duty in raising money for the support of the schools. *Brown v. Town Board of School Directors*, 27

COMPARISON of handwriting. See BILLS AND NOTES, 3.

COMPENSATION.
For publishing list of unredeemed lands. See CONTRACTS, 5.
For land taken and injured. See RAILROADS, 1–5.
Of commissioners to review equalization. See TAXATION.

COMPLAINT. See COMMON SCHOOLS. COSTS, 1. DEATH, 1. EQUITY, 1. INSURANCE, 4, 5. LOGS AND LUMBER, 2, 8. MARRIAGE, 1. PARTIES. PLEADING. TOWNS, 1, 2. WATERCOURSES, 1, 2.

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CONDITIONS PRECEDENT. See HIGHWAYS, 7, 8. INSURANCE, 6. TAX TITLES, 2.

CONSENT, Age of. See MARRIAGE, 3, 4.

CONSOLIDATION. See ACTION, 1, 2.

CONSTITUTIONAL LAW. See CORPORATIONS, 1–3. COUNTIES. CRIMINAL LAW, 4. ELECTIONS. WATERCOURSES, 4.

CONTINGENT CLAIMS. See ESTATES OF DECEDENTS, 2.

CONTRACTS.

See BILLS AND NOTES. CORPORATIONS, 1, 7. DAMAGES, 8, 10. EVIDENCE, 4, 9. FRAUD. HUSBAND AND WIFE, 2–4. INSURANCE. LOGS AND LUMBER, 1, 2, 7. MARRIAGE. MINES AND MINING. PARTNERSHIP. RELIGIOUS SOCIETIES. SALE OF CHATTELS. SPECIFIC PERFORMANCE. SURETYSHIP. TOWNS. VENDOR, ETC. OF LAND.

1. In an action for a balance due for cutting and delivering logs under a contract signed by but one of the two defendants, the evidence (showing, among other things, that the plaintiff's written bid for doing the work had been accepted by both defendants, and that the one who did not sign the formal contract had directed his codefendant to execute it on his behalf, and held himself liable to plaintiff for whatever might become due thereon) is *held* to justify the refusal of a nonsuit as to the defendant who did not sign. *McPhee v. McDermott,* 33
2. Evidence as to the work done under the written bid, and the bid itself and its acceptance, were admissible. *Ibid.*
3. Evidence that the plaintiff had issued time-checks on the defendant who did not sign the contract, but who paid all such checks, was competent. *Ibid.*
4. The plaintiff, in a contract to do the wood-work and masonry upon a county jail, agreed with the county that he would look solely to the other contractors for any damages caused by their delay. With knowledge of such agreement, the defendant contracted with the county to do the iron-work on the jail in such time as not to delay the plaintiff. *Held,* that for a breach of the latter agreement the plaintiff could maintain an action directly against the defendant. *Grant v. Diebold S. & L. Co.* 72
5. Where the number of descriptions in the list of unredeemed lands sold for taxes is less than three thousand, the printer publishing such list is entitled to the compensation prescribed by sec. 1174, R. S., even though he agreed to publish the same at a less rate. *Hoffman v. Chippewa Co.* 214

CONTRIBUTION. See PARTNERSHIP, 7–10. SURETYSHIP.

CONTRIBUTORY NEGLIGENCE. See INSTRUCTIONS TO JURY, 6. RAILROADS, 17, 18, 21, 22.

CONVERSION. See DEBTOR AND CREDITOR.

CONVEYANCE. See COUNTIES. EASEMENTS. EXECUTIONS. LOGS AND LUMBER, 1. MINES AND MINING. PUBLIC LANDS. SPECIFIC PERFORMANCE. TAX TITLES. VENDOR, ETC. OF LAND.

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CORPORATIONS.

See RAILROADS. TELEPHONE COMPANIES.

1. The constitution of Michigan provides that the stockholders of all corporations shall be individually liable for all labor performed therefor, and a statute of that state provides that "said liability may be enforced by action in *assumpsit*," and that "suit for such labor may be commenced against any or all the stockholders and the corporation jointly." *Held*, that the remedy by action in *assumpsit* is exclusive, and that the corporation must be a party. *May v. Black*, 101

2. The remedy thus given against the stockholders can be enforced only in the courts of Michigan. *Ibid.*

3. Ch. 346, Laws of 1889, entitled "An act to enable members of the Methodist Episcopal Church, or of annual conferences, to form an insurance corporation, and to regulate the same," and which speaks throughout of but one organization, is *held* to authorize the formation of one corporation only, and hence to contravene sec. 31, art. IV, Const., prohibiting the legislature from enacting any special or private law "for granting corporate powers or privileges, except to cities." *State ex rel. Church Mut. Ins. Co. v. Cheek*, 284

4. Under secs. 3218, 3219, R. S., a creditor or stockholder of an insolvent insurance corporation may maintain an action to restrain the exercise of its corporate rights, etc., for the appointment of a receiver, and to close up the business of the corporation. *In re Oshkosh Mut. F. Ins. Co.* 366

5. The fact that a dissolution of the corporation is prayed for in such action does not impair the jurisdiction of the court to grant the relief authorized by said sections. *Ibid.*

6. Such an action having been commenced and an injunction granted and a receiver appointed, an application by the attorney general for an order that the corporation show cause why its business should not be closed and a receiver appointed was properly denied. The attorney general might become a party to the pending action and ask therein for a dissolution of the corporation, which might then be granted, and all the ends sought might thus be attained without another independent proceeding. *Ibid.*

7. The owner of mines agreed with certain persons to form a corporation, they to put in $20,000, and he to put in the mines and to have one half of the stock issued. The $20,000 was furnished, and stock to that amount was issued to the parties furnishing it. By mistake the articles of incorporation fixed the whole capital stock at $20,000 instead of $40,000. To correct this mistake a resolution increasing the capital stock to $40,000 was adopted with the assent of all the stockholders. *Held*, that even if such resolution was adopted at a meeting of the directors instead of the stockholders, the assent and acquiescence of all the stockholders cured the irregularity; and the owner of the mines, having conveyed them to the corporation in execution of the original agreement, was entitled to certificates of stock to the amount of $20,000. *Bailey v. Champlain M. & P. Co.* 453

8. A court of equity may, in a suit by a stockholder, adjudge that stock issued by a corporation is void on the ground of fraud. *Ibid.*

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COSTS.

See APPEALABLE ORDER, 2. WILLS, 8.

1. The engrossed copy of a pleading or paper in an action is for filing, and costs cannot be taxed for an additional copy for that purpose. *Reid v. Martin*, 142

2. Where the sheriff's return shows service of a subpœna on several witnesses both within and without the county, it will be presumed, in the absence of a showing to the contrary, that his charges of mileage are only for travel within the county. *Ibid.*

3. The correction in this court of a mere clerical error in a judgment, which would have been corrected in the court below had attention been there called to it, is not allowed to affect the question of costs on the appeal. *Ibid.*

COUNTERCLAIM. See INTEREST. SALE OF CHATTELS, 8.

COUNTIES.

See CONTRACTS, 5. TAXATION.

A conveyance of its lands by a county as a donation to a railroad company is void: and the legislature, having no power to authorize such donation in the first instance, cannot by a subsequent statute validate the conveyance. *Ellis v. N. P. R. Co.* 114

COUNTY CLERK: Breach of official bond. See PARTIES.

COURT AND JURY. See EASEMENTS, 5. INSTRUCTIONS TO JURY. RAILROADS, 18, 22–24. TELEPHONE COMPANIES, 2.

COVENANT running with land. See MINES AND MINING.

CRIMINAL LAW AND PRACTICE.

See FORFEITURES.

1. The bill of exceptions in a criminal action must be settled and signed within the time limited for the issuance of a writ of error, *i. e.*, within two years after the entry of judgment. *Miller v. State*, 271

2. On a writ of error in a criminal case, where no bill of exceptions has been settled and returned to this court, nothing can be considered except the sufficiency of the information and verdict and the judgment thereon. *Sisson v. State*, 273

3. It was not error for the trial court to appoint, as counsel to assist the district attorney in a prosecution for murder, an attorney who had been retained by the father of the deceased to assist in such prosecution, but who had received no compensation and, before his appointment by the court, renounced such employment. *Bird v. State*, 276

4. Ch. 140, Laws of 1889, amending sec. 2545, R. S., and providing that "grand jurors shall be summoned to attend each term of the circuit court unless the judge thereof shall make, . . . at least fifteen days before the sitting of the said court, an order in writing directing such jury not to be summoned," did not apply to a term of court commencing less than fifteen days after the act took effect; and, although such order was not made, a person might be tried at such term for murder upon an information. *Ibid.*

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5. An assaulted party is not bound to call upon by-standers to restrain his assailant from making a threatened attack before making personal resistance to such attack. *Ibid.*

6. An order for a change of venue, which recites the filing of an affidavit of prejudice, is not invalid merely because the clerk failed to indorse upon such affidavit the fact of filing. *State v. Compton*, 460

7. Mere delay in making an order for a change of venue — in this case for about two months after the making of an affidavit of prejudice — does not invalidate the order. *Ibid.*

8. The mere fact that the clerk, upon a change of venue being ordered, failed to transmit with the other papers a copy of his minutes, does not prevent the change being effectual. *Ibid.*

9. Failure to require the accused to enter into a recognizance, as provided in sec. 4682, R. S., for his appearance in the court to which the venue is changed, does not prevent that court from acquiring jurisdiction of the action; nor does any irregularity in bringing the accused into that court deprive it of such jurisdiction. *Ibid.*

10. Sending to ladies engaged in business a letter as follows: "If you do not leave this city inside 10 days you will be tarred and feathered, now we 'mean' it, from the lovers of decent 'Citizens.' You are counted a nusants by all,"— is an offense under sec. 4380, R. S., as amended by ch. 243, Laws of 1887. *Ibid.*

11. Where a county is named in the caption of an information by an officer describing himself as the district attorney of that county, an allegation that the offense was "then and there" committed sufficiently shows that it was committed in said county. *State v. S. A. L.* 467

12. Where the statute requires an affidavit to state *the facts showing* that the affiant was not, at the completion of the registry, a qualified elector but has since become such, perjury cannot be assigned upon an affidavit stating merely that he was not at said time a qualified elector and that he has since become such. *State v. Lloyd*, 630

13. An information charging perjury in the making of an affidavit should show that such affidavit was intended to be used in or was material to some judicial proceeding or inquiry before some officer having cognizance thereof. *Ibid.*

14. The plaintiff in error, who had just been married, fired into, and wounded one of, a *charivari* party which, for the third time, had assembled in front of his house and was serenading him with the firing of guns, blowing of horns, beating upon pans, etc. Upon his trial for an assault with intent to kill, witnesses for the state were allowed to testify that it was customary in that neighborhood to give a newly married couple a *charivari* unless there had been a public wedding to which all the people of the neighborhood were invited. *Held*, error. *Minaghan v. State*, 643

CUSTOM. See CRIMINAL LAW, 14. DAMAGES, 10. LOGS AND LUMBER, 8.

DAMAGES.

See DEATH. HIGHWAYS, 9. PARTNERSHIP, 5. RAILROADS, 6. VENDOR, ETC. OF LAND, 5.

1. A verdict, awarding $2,000 to a mother for the death of her daughter sixteen years old, upon whom she was largely dependent for support and who had some capacity for earning money, is *held* not excessive. *Wiltse v. Tilden*, 152

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2. Since the amount recovered in an action for the death of a person belongs to the relatives specified in sec. 4256, R. S., the jury should not be instructed to give damages to recompense the *estate* of the deceased. *Gores v. Graff,* 174

3. An error in authorizing the jury to give punitory damages in a case in which they are not recoverable will work a reversal where it cannot be determined from the verdict whether or not it includes such damages. *Patry v. C., St. P., M. & O. R. Co.* 218

4. In an action for injuries to a boy seven years old, which necessitated amputation of both legs, the jury were instructed that in assessing damages they should give adequate compensation for the plaintiff's physical and mental pain and suffering, past and future, occasioned by his injuries; "also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows." *Held,* not error, the words quoted not being intended to specify new elements or grounds for damages, but merely to indicate the causes from which the mental pain and suffering would be likely to arise. *Heddles v. C. & N. W. R. Co.* 228

5. A verdict for $18,500 for injuries to a boy seven years old, necessitating the amputation of both legs and impairing his mental capacities, is *held* not excessive. *Ibid.*

6. In assessing damages for the death of a person caused by negligence, where the amount recovered will belong to the children of the deceased, the jury may consider the number of years the deceased would probably have lived, the reasonable expectation of the amount of his or her property being increased, and the reasonable expectation of pecuniary benefit to the children, or any of them, by way of support or otherwise, had the deceased continued to live. *Tuteur v. C. & N. W. R. Co.* 505

7. The fact that the children were all of age when their mother's death was caused by negligence, would not preclude a recovery for the loss of such pecuniary benefits as they had a reasonable expectation of securing from her additional accumulations. *Ibid.*

8. In an action to recover a balance alleged to be due upon a contract for work done, the answer was merely a general denial. The trial court charged the jury, in effect, that the plaintiff might recover all that had become due up to the time of the verdict, for the work done before the commencement of the action. The defendant did not ask for any instruction as to any part of the demand which he claimed was not due when the action was commenced. *Held,* that the judgment for the plaintiff would not be reversed. *La Flex v. Burss,* 538

9. A verdict awarding damages for personal injuries will not be set aside on the ground that such damages are inadequate, unless they are so disproportionate to the injuries that the jury must have been influenced by a perverted judgment. A verdict for $167 in this case is not disturbed. *Robinson v. Waupaca,* 544

10. In an action to recover damages for a failure to furnish the agreed quantity of logs under a contract for sawing, the mill-owner may recover (in addition to the difference between the contract price for the sawing and the actual cost of doing the work) the value of the slabs to which, by a general custom, he would have been entitled. *Hewitt v. John Week L. Co.* 548

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DEATH CAUSED BY NEGLIGENCE, ETC.

See DAMAGES, 1, 6, 7. PHYSICIANS AND SURGEONS.

1. In an action to recover for the death of a girl, a complaint alleging that the plaintiff, who sues as administratrix, was the mother of the intestate and dependent upon her in a large degree for support and had suffered pecuniary injury by reason of her death to an amount stated, is *held* sufficiently to show that the plaintiff was a person entitled to the money when recovered. *Wiltse v. Tilden*, 152

2. Evidence, in such case, that the plaintiff had been divorced from her husband and that the custody of the girl had been awarded to her, and evidence of her pecuniary necessities and of the education and capacity of the girl for earning money, was admissible. *Ibid.*

DEBTOR AND CREDITOR.

See CHATTEL MORTGAGES. CORPORATIONS, 1. EVIDENCE, 9. EXECUTIONS. INTEREST. LIBEL, 2–9. PARTNERSHIP, 1. SETOFF. WILLS, 1, 2.

Chattels which had been mortgaged by a debtor were attached in an action by an unsecured creditor, and were afterwards sold under an execution on a judgment in favor of another unsecured creditor, who himself purchased the goods at such sale. The proceeds of the sale were in the hands of the sheriff. *Held*, that an action in equity could not be maintained by said judgment creditor and the sheriff to have the mortgages declared void or to restrain the prosecution of an action by one claiming under said mortgages against the sheriff for a conversion of the goods. The remedy at law was adequate. The judgment creditor might, under sec. 2610, R. S., become a party to the action for a conversion and therein attack the validity of the mortgages; and the priority of the liens of the different creditors might be determined by the court on motion. *Mackey v. Michelstetter*, 210

DEDICATION. See HIGHWAYS, 2–5.

DEED. See COUNTIES. EASEMENTS. EQUITY. EXECUTIONS. LOGS AND LUMBER, 1. MINES AND MINING. PUBLIC LANDS. TAX TITLES. VENDOR, ETC. OF LAND.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See CRIMINAL LAW, 7. LOGS AND LUMBER, 6. SALE OF CHATTELS, 6, 7. VENDOR, ETC. OF LAND, 4.

DELIVERY. See SALE OF CHATTELS, 7–9.

DEMAND. See WILLS, 6.

DEMURRER. See EQUITY, 1. INSURANCE, 4, 5. TELEPHONE COMPANIES, 2.

DESCRIPTION of place of accident and of defect. See HIGHWAYS, 8.

DISCRETION. See NEW TRIAL, 1–3. PLEADING, 1. PRACTICE, 3.

DIVORCE. See MARRIAGE.

DOWER. See HUSBAND AND WIFE, 2–4.

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EASEMENTS.

1. A right of way from the land of the grantee to a public road was, by the terms of the grant, to be "on or near" a certain boundary line which, at the nearest point (its eastern end), was about twenty rods south of the road. As located by the grantor and used by the grantee for many years, the right of way began to diverge from said boundary line at the western end thereof, and reached the road at a point about north of the eastern end. A re-survey afterwards established the boundary line about three rods further south than the parties had supposed it to be. *Held*, that the grantee was still entitled to the right of way as originally located and used, and that the grantor could not compel him to follow a route nearer to said boundary line. The grantee was also entitled to a right of way over said three rods by the shortest practicable route. *Fritsche v. Fritsche*, 266

2. An action of ejectment cannot be maintained to recover a mere easement. *Fritsche v. Fritsche*, 270

3. Where the owner of land obstructs a way over the same to a highway, the person having the right of way may cross the land of the same owner at some other convenient place to reach the highway. *Johnson v. Borson*, 593

4. The owner of land subject to a right of way to a highway is *held* to have had the right, in order to protect his enclosed land, to maintain a reasonable gate or bar-way at a point practically at the end of the private way — the land between such gate and the highway being unenclosed. *Ibid.*

5. The question whether a gate or bar-way across a right of way is an unreasonable obstruction or not, is usually one of fact for the jury. *Ibid.*

EJECTMENT. See EASEMENTS, 2.

ELECTIONS.

The ballots for judicial officers and those for other officers elected on the same day being required by sec. 89, R. S., to be put into separate boxes, ballots having the word "*Judiciary*" printed on the back thereof are not void under sec. 3, art. III, Const. (which provides that "all votes shall be given by ballot"), nor under sec. 10, ch. 464, Laws of 1885 (which makes it an offense to print or circulate printed ballots having any "printing, engraving, device, or mark of any kind upon the back thereof"). *State ex rel. Briesen v. Barden*, 601

EMINENT DOMAIN. See RAILROADS, 1–5.

EQUITY.

See ACTION, 2. CORPORATIONS, 8. DEBTOR AND CREDITOR. INSURANCE, 4, 5. SPECIFIC PERFORMANCE. WATERCOURSES.

1. In an action to quiet title to land all persons interested in the subject matter adversely to the plaintiff may be made defendants, and the fact that defendants' claims arise from different sources and are in conflict with each other, or that one of the defendants claims all the land and the others separate parcels thereof, does not render their joinder as defendants improper, or make the complaint multifarious. *Ellis v. N. P. R. Co.* 114

2. Under sec. 3186, R. S., the action to quiet title may be maintained against one claiming under a void deed. *Ibid.*

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ESTATES OF DECEDENTS.

See DAMAGES, 2. DEATH. HUSBAND AND WIFE, 2–4. INSURANCE, 5. SPECIFIC PERFORMANCE. WILLS.

1. An order limiting the time for presenting claims against the estate of a decedent, and a notice by the court, signed at the same time, appointing the times and place for the examination of such claims, are treated as one order and *held* effectually to limit the time for presenting such claims. *Brill v. Ide's Estate*, 75 Wis. 113, distinguished and questioned. *Austin v. Saveland's Estate*, 108
2. A joint and several note executed by the decedent, though not payable until after the expiration of the time limited for presenting claims, should be presented as a claim within that time, and the failure so to present it will bar the holder from a recovery thereon against the estate. Such a claim is not a contingent one, within the meaning of sec. 3858, R. S. *Ibid.*
3. Under sec. 3267, R. S., a foreign administrator may have the same rights and remedies as one appointed in this state, upon filing his appointment or a duly authenticated copy thereof in *any* county court in this state — not necessarily in a county in which the decedent had property or in which suit is to be brought. *Murray v. Norwood*, 405

ESTOPPEL. See CONTRACTS, 5. GUARDIAN AND WARD, 4. HUSBAND AND WIFE, 4. LOGS AND LUMBER, 5.

EVIDENCE.

See BILLS AND NOTES, 2–4. CONTRACTS, 1–3. CRIMINAL LAW, 14. DEATH, 2. LIBEL, 5–8. LOGS AND LUMBER, 3, 4, 7, 8. MASTER AND SERVANT, 1, 3. MINES AND MINING, 3. PRACTICE, 2. RAILROADS, 9–14, 25, 26. REPLEVIN, 1. SALE OF CHATTELS, 4, 11. WILLS, 2.

1. Evidence of a parol statement as to an account is *held* not to have prejudiced a defendant who afterwards introduced in evidence the account itself, which was substantially as stated. *McPhee v. McDermott*, 33
2. Where a complaint contains two counts or causes of action, an objection to the admission of any evidence under the second cause of action should be made when such evidence is offered. *Ibid.*
3. The opinions of witnesses upon questions which the jury are as competent to determine as they, are inadmissible. *Willse v. Tilden*, 152
4. A writing whereby the lessee of an engine agrees to accept it and keep it thirty days and pay a specified sum per day, signed only by said lessee and containing no agreements on the part of the lessors, does not preclude parol proof that such lessors warranted the engine to be in good repair and fit to perform the work for which it was leased. *Smith v. Coleman*, 343
5. A witness who had been in the banking business for twenty-two years, engaged in buying and selling municipal bonds, and who had a general knowledge of the value of such securities, was competent to give an opinion as to the value of Atlanta city bonds, although he had never dealt in them and had no special knowledge as to their market value. *Murray v. Norwood*, 405
6. An objection to the admission of a will in evidence on the ground that it is immaterial and incompetent for any purpose, is not available to exclude it on the ground that it is not sufficiently authenticated or proved. *Crawford v. Witherbee*, 419

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7. In an action against a town for personal injuries caused by a defective highway, an error in allowing witnesses to testify that in their opinion the dog-cart in which the plaintiff was riding was unsafe, is *held* immaterial, the jury having found for the plaintiff. *Robinson v. Waupaca,* 544

8. An unrecorded plat of additions to a city may be admissible in evidence to prove the location and identity of a lot described in a contract for the sale thereof by reference to such plat. *Lutz v. Compton,* 584

9. The question being whether a sale of chattels was fraudulent as to the vendor's creditors, the opinion of a witness who was present and assisted in making the sale, as to the honesty or dishonesty of the transaction, is inadmissible; and the admission of such opinion is a material error, even though all the facts relating to the sale were before the jury. *Rindskopf v. Myers,* 649

10. In replevin for a horse it appeared that one M., being the owner thereof, had mortgaged it to one S. to secure the performance of a contract. After the contract had been fully performed, M. mortgaged the horse to one G. Subsequently S. took the horse from M. in an action of replevin, and sold it under his mortgage to the plaintiff; and thereafter G. took it from the plaintiff under his mortgage, and sold it to the defendant. *Held,* that the record and papers in the replevin suit of S. against M. were not admissible in evidence against the defendant in this action. *Bailey v. O'Donnel,* 677

11. There being no evidence other than such record and paper which would sustain the verdict for the plaintiff, the admission thereof was a material error. *Ibid.*

EXCEPTIONS. See APPEAL, 1, 2, 4, 5. CRIMINAL LAW, 1, 2. INSTRUCTIONS TO JURY, 5.

EXCESSIVE DAMAGES. See DAMAGES, 1, 5.

EXECUTIONS.

See JUDGMENT, 2.

1. A judgment creditor who purchases at his own execution sale in satisfaction of his judgment takes only the actual interest of the judgment debtor in the land so purchased, without regard to the state of the record title. *Main v. Bosworth,* 660

2. Land was conveyed by a deed absolute on its face, but without consideration, and the grantee, pursuant to a parol agreement, mortgaged it for his own benefit and then reconveyed to the original owner. After the mortgage was given, but before the reconveyance, a judgment against said grantee was docketed and the land was sold under an execution thereon to one of the judgment creditors. *Held,* that the parol trust or agreement to reconvey, having been executed, was valid and might be proved, and that the purchaser at the execution sale obtained no interest in the land. *Ibid.*

EXECUTORS AND ADMINISTRATORS. See ESTATES OF DECEDENTS. WILLS.

EXEMPLARY DAMAGES. See DAMAGES, 5.

EXPERT TESTIMONY. See EVIDENCE, 3, 5, 7, 9. RAILROADS, 12.

EXTENSION of time. See BILLS AND NOTES, 1.

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FEES of sheriff. See COSTS, 2.

FELLOW-SERVANTS. See MASTER AND SERVANT, 4, 9.

FILING. See CHATTEL MORTGAGES, 1. CRIMINAL LAW, 6.

FINES. See FORFEITURES.

FIRE INSURANCE. See INSURANCE, 2–6.

FORFEITURES.

1. The penalty for the first offense under sec. 3, ch. 248, Laws of 1879, relating to adulteration and fraud in foods, etc., may be collected in a civil action by the state. Such first offense is not a misdemeanor, nor the penalty a fine, within the meaning of sec. 3294, R. S. *State v. Grove*, 448

2. An act or omission "specially declared by law to be a misdemeanor," within the meaning of sec. 3294, R. S., is one so declared by statute. *Ibid.*

3. Under sec. 3294, R. S., a penalty, forfeiture, or fine may be collected in a civil action unless the act or omission punishable thereby is also punishable, in the discretion of the court, by imprisonment either with or without the fine, or is specially declared by statute to be a misdemeanor, or, possibly, unless a statute prescribes that the offense be punished by fine *eo nomine* without further direction. *Ibid.*

FRAUD.

See CORPORATIONS, 8. DEBTOR AND CREDITOR. EVIDENCE, 9. HUSBAND AND WIFE, 1, 4. LIMITATION OF ACTIONS. TAX TITLES, 4, 5.

One who has by fraud induced another to execute a contract cannot enforce it on the ground that the party so executing should have used greater care to avoid imposition. *Warder, B. & G. Co. v. Whitish*, 430

FRAUDS, STATUTE OF. See EXECUTIONS, 2. VENDOR, ETC. OF LAND, 3.

FRAUDULENT CONVEYANCES. See DEBTOR AND CREDITOR. EVIDENCE, 9. PARTNERSHIP, 1.

FREE HIGH SCHOOLS. See TOWNS, 6.

GRAND JURY. See CRIMINAL LAW, 4.

GUARDIAN AND WARD.

1. Charges by a guardian of minor children for the support of his wards prior to his appointment as such guardian are only allowed when there are the strongest equities in favor thereof. *Olsen v. Thompson*, 666

2. Minor children having no estate were taken into the family of their mother's brother-in-law. Two years later a small amount of money was left them by their grandfather, and the said brother-in-law was appointed their guardian. Upon evidence tending to show, among other things, that when the children entered his family it was understood between him and their mother that no charge was to be made for their board, it is *held* that charges by said guardian for their board prior to his appointment were properly disallowed. *Ibid.*

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3. Said guardian having been allowed, on his final accounting, for the board of his wards after his appointment, at the rate charged therefor in a previous account rendered by him, this court declines, upon the evidence, to hold such allowance insufficient. *Ibid.*

4. Orders made by the county court upon the examination of annual accounts rendered by a guardian are not an estoppel against him at the final accounting (County Court Rule X, sec. 10), but are admissible in evidence, in connection with said accounts, to show the character of the claims made by him. *Ibid.*

5. A guardian is chargeable with interest on the balance of the estate in his hands. *Ibid.*

HIGHWAYS.

See TELEPHONE COMPANIES.

1. In an action against a town for the death of a person resulting from defects in a highway caused by an overflow of a neighboring creek, a charge to the jury that if the dangerous condition of the road at the time of the accident might reasonably have been anticipated by the town authorities, in view of the previous known defects therein and the nature of the creek, it was their duty to have closed up the road until it was repaired, or to have provided means for warning travelers of the danger, is *held* not erroneous. *Wiltse v. Tilden*, 152

2. In an action of trespass against town officers who had torn down a fence built by the plaintiff, the evidence—showing, among other things, that the fence was in a traveled road, and that the plaintiff had previously built other fences so located as to manifest an intention to dedicate the *locus in quo* as a public highway, and had allowed it to be used as such for many years—is *held* to sustain a verdict to the effect that the fence torn down was in a public highway which had become such by lawful user. *Bartlett v. Beardmore*, 356

3. One of the questions submitted for a special verdict was, "Was any part of the fence which defendants pulled down in a public highway which had become such by lawful user?" *Held*, that there was no abuse of discretion in the wording of the question. *Ibid.*

4. The public may acquire by user a right to more than the main traveled track of a road, especially where the owner of the land has manifested an intention to dedicate to the public a highway of the usual width. *Ibid.*

5. An instruction to the jury that to constitute a valid dedication there must be an actual intent to dedicate, "of which the user by the public is evidence and no more, and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment," is *held* to have been properly refused. *Ibid.*

6. A barbed-wire fence intentionally placed lengthwise in the traveled portion of a public highway is an obstruction within the meaning of sec. 1326, R. S., and may be removed as therein provided. *Ibid.*

7. The giving of the notice of an injury caused by a defective highway in a town, required by sec. 1339, R. S., is sufficiently proved by showing that it was received by the proper officer within the statutory time and filed by him with the town clerk. *Wieting v. Millston*, 523

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8. A notice stating that J. W. "was injured by being thrown from a wagon on the main highway on section 2, town 20 north, of range 2 west, at a point where said road turns and runs due north, and where said road goes over a hill or bluff; that said injury was caused by a hole being washed in the road, so that in descending the hill, going south, the wagon plunged off from a stone table into said washout," — is *held* sufficiently to describe the place where the accident happened and the defect in the highway which caused it. *Ibid.*

9. In an action against a town for the breaking of a leg caused by a defective highway, it appeared that the plaintiff, after having so far recovered as to be about on crutches, had his leg broken a second time by the overturning of a buggy in which he was riding. *Held*, that if the leg would not have been so broken but for its weakened and impaired condition due to the previous breaking, and if the plaintiff was not chargeable with any negligence in respect thereto, he could recover for such second breaking as one of the natural consequences of the first. *Ibid.*

HOMESTEAD. See INSURANCE, 5.

HUSBAND AND WIFE.

See INSURANCE, 2. TAX TITLES, 5. WILLS, 7.

1. Testimony of a husband that, because of some trouble, he had conveyed all his property to his wife; that she kept all the money, and when he wanted any gave it to him; and that she gave him the money with which he purchased tax certificates, does not show that she had any separate estate with which to purchase the certificates. *Fox v. Zimmermann*, 414

2. In an action to recover dower it appeared that an antenuptial agreement executed by the plaintiff and her deceased husband had been lost or destroyed. The attorney who drew it, a witness thereto, and another attorney who used it in drawing a subsequent agreement testified as to its terms, substantially agreeing that the deceased therein agreed that the plaintiff should have $1,000 from his estate if she survived him, and her support as long as she lived, in lieu of dower and in full of all allowances and all claims against his estate, and that the plaintiff therein agreed to marry him and be a true wife. *Held*, that the terms of the agreement satisfactorily and sufficiently appeared from the evidence, and that it was a valid agreement, binding upon both parties. *West v. Walker*, 557

3. A subsequent agreement, executed some years after the marriage and shortly before the husband's death, with substantially the same terms, but making slight additional gifts to the plaintiff, is *held* to be merely an amendment and continuation of the antenuptial agreement, it being conclusively shown that it was so understood and intended by the deceased, although by its terms it revoked the previous agreement. The plaintiff could not, therefore, waive the benefits of the later agreement, and claim dower and her other rights in the estate under the law. *Ibid.*

4. Having lived with her husband for several years before the execution of the later agreement, the plaintiff will be presumed to have known then the value and extent of his property; and by her acceptance of such agreement, making but a slight additional provision for her, she is estopped to claim that when the antenuptial agreement was executed she was deceived as to the amount of his property. *Ibid.*

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IDENTIFICATION of property. See REPLEVIN, 1.

INFORMATION. See CRIMINAL LAW, 4, 11, 13.

INJUNCTION. See CORPORATIONS, 4–6. WATERCOURSES.

INSOLVENCY. See LOGS AND LUMBER, 6. PARTNERSHIP, 1.

INSTRUCTIONS TO JURY.

See APPEAL, 5. DAMAGES, 4, 8. HIGHWAYS, 1, 5. LIBEL, 9. MASTER AND SERVANT, 2. RAILROADS, 8, 27. REPLEVIN, 2–4. SALE OF CHATTELS, 1, 4. VERDICT, 2, 3.

1. An instruction that if the jury believe a witness has not stated the truth they may reject his testimony, but that they should not reject it without reason or without due care, *held* not erroneous. *Boyington v. Sweeney,* 55

2. The jury should not be instructed that if there is a preponderance of evidence tending to prove the facts essential to a recovery they should find for the plaintiff. The instruction should be that if the jury are satisfied from a preponderance of the evidence that all such facts have been proved they should find for the plaintiff; otherwise, for the defendant. *Gores v. Graff,* 174

3. Sec. 2853, S. & B. Ann. Stats., does not require the trial judge to instruct the jury in every case. And a party who does not ask that the jury be instructed either generally or specifically will be deemed to have assented to the submission of the case to the jury without instructions. *Stuckey v. Fritsche,* 329

4. The refusal to give an instruction as to the duty of a party if he had entered into a certain contract is not error where the jury found that he had not entered into such contract, and where the instruction was substantially given in the general charge, and the evidence was conclusive that such duty was performed. *Warder, B. & G. Co. v. Whitish,* 430

5. Where the jury was instructed that a certain issue was the only one in the case, a party claiming that there were other issues should have called the attention of the court thereto and asked further instructions. An exception to the instructions on the ground that they did not embrace all the questions at issue is not sufficient. *Newton v. Whitney,* 515

6. The refusal to give special instructions on the subject of contributory negligence is *held* not to have been error where such instructions were in the nature of an argument based upon some of the evidence, and the general charge contained a full and fair statement of the law. *Wieting v. Millston,* 523

INSURANCE.

Accident.

1. An insurance policy provided that the principal sum should be paid if the insured, from a violent and accidental injury which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot." The insured was accidentally shot in the back, the bullet penetrating his spine and producing immediate and total paralysis of the lower part of his body, and entirely destroying the use of both feet. *Held,* that he had suffered "the loss of two entire feet," within the meaning of the policy. *Sheanon v. Pacific Mut. L. Ins. Co.* 618

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INSURANCE — *Fire.*

2. A married man purchased a farm and buildings, paying therefor with his own money. By his direction the deed was made to his wife, there being an understanding between them that she would convey to him on request. He made improvements, and had possession and the entire beneficial use of the farm and buildings, cultivating the farm at his own expense, and using the proceeds in the support of his family. All the personal property on the farm belonged to him. *Held*, that he had an insurable interest in the buildings. *Horsch v. Dwelling House Ins. Co.* 4

3. Three buildings and certain personal property, situated on three different farms, were insured, each for a separate amount, by a policy stating the premium as a gross sum. That sum was 1½ per cent. of the aggregate insurance. *Held*, that the contract was divisible, and that the sale of one of the buildings, in violation of a stipulation against changing the title of the insured property without the consent of the insurer, did not avoid the policy as to the other property situated several miles from the building sold. In the absence of evidence to the contrary it is presumed that each item was insured at 1½ per cent. premium, and the contract is construed as though it was so expressed in the policy. *Loomis v. Rockford Ins. Co.* 87

4. An action upon a policy of insurance against fire to recover the amount of a loss is not in equity although, in addition to the money judgment, the complaint prays for such further relief as may be equitable; and a general demurrer cannot be sustained on that ground. *Bailey v. Ætna Ins. Co.* 336

5. Where the property destroyed was a homestead and the action is brought by the widow of the insured, as such and as administratrix, the fact that the heirs of the insured are also joined as plaintiffs does not make the action one in equity or render the complaint demurrable. *Ibid.*

6. An insurance policy provided that in case of a difference as to the amount of any loss or damage it should be submitted to arbitrators, and that no action against the company for the recovery of any claim for loss should be sustained unless an award by arbitrators had first been returned. *Held*, that these provisions did not apply to a case where the company denied all liability whatever on the policy. *Ibid.*

INSURANCE COMPANIES. See CORPORATIONS, 3–6.

INTEREST.

See GUARDIAN AND WARD, 5. SURETYSHIP, 4.

Though upon a liquidated claim interest is recovered from the time when the cause of action accrued, upon an unliquidated counterclaim thereto, accruing at the same time, interest is recoverable only from the date of service of the answer. *Hewitt v. John Week Lumber Co.* 548

ISLANDS. See PUBLIC LANDS.

JOINDER.
Of causes of action. See EQUITY, 1.
Of parties. See PARTIES.

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JUDGMENT.

Upon facts proved but not found. See RAILROADS, 24.

By default against defendant not served. See JUSTICES' COURTS, 2.

Upon whom binding.

1. A judgment is not binding upon a person not a party to the action and whose application to be made a party had been granted only upon conditions which the court had no right to impose and with which he refused to comply. *Coleman v. Hunt,* 263

Lien of judgment. See EXECUTIONS.

Offsetting judgments.

2. A stay of execution upon a judgment is a protection against the collection of any part of it by legal process, and hence another judgment cannot be offset against it during such stay. *Treat v. Hiles,* 475

Action upon judgment. See JURISDICTION, 1, 2.

Vacating judgment. See MORTGAGES, 2.

Correction of clerical error. See COSTS, 3.

Reversal on appeal. See APPEAL, 1, 3, 4, 7. BILLS AND NOTES, 4. DAMAGES, 3, 8. EVIDENCE, 1, 7, 9, 11. LIBEL, 9. RAILROADS, 11, 26. SALE OF CHATTELS, 4.

JURISDICTION.

See CORPORATIONS, 2, 5. CRIMINAL LAW, 4, 9. JUSTICES' COURTS.

1. An order granting leave to bring an action upon a judgment is not void for want of jurisdiction although notice of the motion therefor was served less than eight days before the order was made. *Cole v. Mitchell,* 131
2. When the notice in such case states the amount of the judgment unpaid, the want of service of any affidavit or other paper on which the motion was founded is not a jurisdictional defect. *Ibid.*
3. Where an action for the recovery of real property has been brought in a county other than that in which the property is situated, the court has jurisdiction and the action is properly triable where commenced, unless steps are taken to have the venue changed. *West v. Walker,* 557

JURORS.

See COURT AND JURY. VERDICT.

A change of opinion by a juror on consultation with his fellows in the jury-room is not cause for setting aside the verdict; and though remarks made by jurors, immediately after the jury had retired, indicated a misunderstanding of the case at that time, it will be presumed that such misapprehension was corrected before the verdict was agreed upon. *Newton v. Whitney,* 515

JUSTICES' COURTS.

See APPEAL, 7.

1. A recess taken by a justice's court at 2 o'clock P. M. until 10 o'clock A. M. of the following day, on account of the illness of the justice, is not an "adjournment" within the meaning of subd. 5, sec. 3574,

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R. S., and jurisdiction is not lost by the failure to enter in the docket the place to which such recess is taken. *French v. Ferguson*, 121

2. A judgment by default against a defendant who was not served with process and did not appear is a nullity and does not affect the jurisdiction as to the other defendants. *Ibid.*

LACHES. See LOGS AND LUMBER, 6. NEW TRIAL, 2. SALE OF CHATTELS, 6, 7. VENDOR, ETC. OF LAND, 4.

LAND CONTRACT. See VENDOR, ETC. OF LAND.

LANDS SOLD FOR TAXES. See TAX TITLES.

LIBEL.

1. A newspaper article, headed with the plaintiff's name and a picture of a jackass, and referring to the plaintiff as "an egotistical and overestimated, self-conceited jackass," is libelous *per se*. *Moley v. Barager*, 43

2. Envelopes addressed to a debtor and having printed thereon, in a manner calculated to attract special attention, the name of an association and the statement that it is *for collecting bad debts*, are libelous, and the sending of such envelopes through the mails is a sufficient publication. *Muetze v. Tuteur*, 236

3. A list of delinquent debtors, published by an association for collecting bad debts and sent to all its members throughout the United States and Canada, is not a privileged communication. The printing of a person's name in such list is libelous, and the distribution of a book containing the list among the members of the association is a sufficient publication. *Ibid.*

4. A member of the association who caused the sending of such envelopes and the printing of the name in such list, is responsible for the libel. *Ibid.*

5. It being stated in the book containing such list that it is placed in the hands of all members of the association, and such book being in the hands of one member, who refused to give credit to a person whose name was in the list, the presumption is that the book was distributed as stated. *Ibid.*

6. In an action for the libel by the person to whom credit was refused, the plaintiff was properly allowed to testify that the person refusing him credit exhibited such book to him. *Ibid.*

7. In such action it was sufficient to show that the plaintiff was refused credit on account of the book, without showing that the person refusing the credit had ever trusted him or would have trusted him but for the book. *Ibid.*

8. In such action the plaintiff could not properly be asked how many persons he owed besides the defendant. His general character or reputation only could be shown. *Ibid.*

9. A statement in the charge to the jury that "the evidence shows *three* letters, I think, were mailed," etc., when there were in fact but *two*, is *held* not a material error. In such a case counsel should suggest the correction of the error at the time; otherwise it will be deemed to have been waived. *Ibid.*

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LIMITATION OF ACTIONS.

See ESTATES OF DECEDENTS, 1, 2. SURETYSHIP, 1–3. TAX TITLES, 3.

1. The special limitations upon actions to recover lands sold for taxes (secs. 1188, 1210*d*, R. S.; secs. 2, 3, ch. 309, Laws of 1880; ch. 250, Laws of 1882; ch. 153, Laws of 1883; ch. 133, Laws of 1885), relate exclusively to actions in which the validity or regularity of the tax proceedings is questioned, and do not apply to an action based upon the defendant's fraud in acquiring a tax title. *Fox v. Zimmermann*, 414

2. Under sec. 4222, R. S., providing that in an action for relief on the ground of fraud the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud, mere constructive notice is not such discovery. *Ibid.*

LIVE-STOCK. See RAILROADS, 7.

LOGS AND LUMBER.

See DAMAGES, 10. SALE OF CHATTELS, 5–9.

1. The pine timber upon certain lands was conveyed to the plaintiff, with a stipulation that it should be cut and removed from the lands before a specified date. Afterwards, with knowledge of the plaintiff's rights, the defendants purchased the land. *Held*, that all timber cut down and severed from the soil by the plaintiff before the date specified became his personal property, which he might remove within a reasonable time after said date. *Hicks v. Smith*, 146

2. A complaint alleged that defendants agreed to purchase about 35,000 feet of logs from plaintiff and to pay him therefor $10 per thousand feet; that they afterwards pretended to purchase said logs from a third person, although plaintiff had notified them that he was the owner and forbade such purchase; that the logs were delivered to defendants, and that they thereby became indebted to plaintiff in the sum of $357.10, which they had not paid; and judgment was demanded for that sum. *Held*, that the action was upon the implied promise to pay for the logs, the tort being waived. *Lee v. Campbell*, 340

3. In such action evidence that defendants agreed to pay said third person $10 per thousand feet for the logs, is sufficient proof, *prima facie*, of their value. *Ibid.*

4. Correspondence between the parties relative to the purchase of logs, but naming a mark different from that on the logs in controversy, was admissible, there being other testimony tending to show that it did, in fact, relate to such logs. *Ibid.*

5. Plaintiffs contracted to sell certain lands to the defendant T., giving him the right to cut the timber thereon, the logs, however, to remain their property until full payment of the purchase price. The contract provided that T. should place a certain mark upon the logs. T. delivered some of such logs, with others cut from other lands, to the defendant D., who converted them to his own use and, in an action for the conversion, claimed that plaintiffs were estopped to assert their ownership as against him because the mark which they had caused to be placed upon such logs was the same as his private recorded log mark, and their logs were, therefore, not distinguishable from others rightfully cut for him by T. It did not appear that plaintiffs had any notice that such mark was D.'s recorded log

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mark, and the evidence was conclusive that D. was not misled by the mark on their logs, and that he knew all about their contract with T. before he obtained possession of such logs. *Held*, that plaintiffs were not estopped, but were entitled to recover the value of the logs, not exceeding the amount of the unpaid purchase money due from T. *Long v. Davidson*, 509

6. The insolvency of T. before the commencement of the action did not affect plaintiffs' right to recover from D., although for a long time prior to such insolvency T. had been in default upon the land contract and plaintiffs had not sued him thereon. *Ibid.*

7. The contract between plaintiffs and the defendant T. was admissible in evidence as against the defendant D. *Ibid.*

8. A custom of the mill-owners on the Wisconsin river to retain the slabs from logs sawed by them is a general custom, which may be proved without having been pleaded. *Hewitt v. John Week Lumber Co.* 548

MANDAMUS. See TOWNS, 6.

MARRIAGE.

1. In an action for the annulment of a marriage an averment in the complaint that the parties have been residents of this state for "one year immediately preceding the commencement of this action," is sufficient in respect to the residence of the plaintiff, under sec. 2359, R. S. *Eliot v. Eliot*, 634

2. Under secs. 2350, 2353, R. S., voluntary cohabitation of the parties before the age of legal consent is reached does not defeat an action for the annulment of a marriage on the ground of want of age to assent thereto. The words, "and there shall have been no subsequent voluntary cohabitation of the parties," in sec. 2350, are *held* to relate only to marriages to which consent has been obtained by force or fraud,—such construction being necessary in order to give effect to sec. 2353. *Ibid.*

3. Sec. 2329, R. S. (providing that persons having attained the ages therein specified shall be capable in law of contracting marriage), abrogates the common-law rule as to ages of consent, although it does not expressly declare that persons under the ages specified shall be incapable of contracting marriage. *Ibid.*

4. An action for the annulment of a marriage on the ground that the plaintiff was under the age of legal consent may be maintained before he reaches that age. *Ibid.*

5. It appearing in this case that the plaintiff has no pecuniary means and no capacity for earning money, but that his father is of ample pecuniary ability and is to some extent responsible for the suit, and that the defendant's father is not able to bear the expenses of the litigation, this court, in the exercise of its discretion in view of all the circumstances of the case, requires the plaintiff to pay $100 suit money to the defendant. *Ibid.*

MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. In an action for personal injuries caused by the fall of a scaffold upon which plaintiff was at work, and which was alleged to have been defectively constructed, it was not error to permit the jury to

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take to their room a model of the scaffold which had been used by the defendant's witnesses to illustrate how it was built, although such model had not been formally introduced in evidence, and the testimony as to its correctness was conflicting. *Blazinski v. Perkins*, 9

2. The plaintiff having told the carpenters who built the scaffold not to put a brace in the middle of it, as they were about to do, because it would be in his way and he would have to take it out, and that the scaffold was all right without it, an instruction that "*a mere suggestion* of the plaintiff that he thought the middle brace was not needed, would not excuse the defendant for not putting the same in its place, if it was necessary to make the scaffold safe," was not applicable to the facts and was properly refused. *Ibid.*

3. Evidence of what the plaintiff told a witness through an interpreter should not be excluded as hearsay. *Ibid.*

4. Brick-masons and their attendants, in the employ of the same person and engaged in the same work upon the same scaffold, are co-employees, and the employer is not liable for an injury to one through the negligence of another. *Ibid.*

5. In an action for personal injuries alleged to have been caused by defects in an edger through which the plaintiff was engaged in running lumber, the jury found that the edger was out of repair, but to the question, "Was the want of repair of the edger a cracked or broken roller or rollers, or rollers that were worn out of proper form by use?" they merely answered "Yes." The complaint alleged that one of the rollers was cracked and broken, but did not allege that they were worn out of proper form by use, and there was no evidence that such was the case. *Held*, that such indefinite and uncertain answer could not aid in supporting the judgment. *Sherman v. Menominee L. Co.* 14

6. To the question whether the defendant's agents knew that the edger was liable on occasions to throw back with great force planks and boards that were passing through it, the jury answered that there was no proof upon which they could base an answer to that question. *Held*, that this was equivalent to a negative answer and should have been received as such, and that it was error to send the jury back, after causing to be read to them portions of the testimony of one witness, but omitting other material portions and other testimony on the same subject. *Ibid.*

7. In the absence of evidence as to whether the defendant's agents knew of plaintiff's inexperience and ignorance of the dangers connected with the machinery, the jury cannot be permitted, in deciding the question, to rely upon mere inference, conjecture, and their own personal experience. *Ibid.*

8. A question as to whether, if the plaintiff had known that under certain circumstances boards were likely to be thrown back from the edger, he could have avoided the injury, being based entirely upon a hypothetical state of facts which the plaintiff insists did not exist, should not have been submitted to the jury. *Ibid.*

9. The foreman in charge of the work of laying water-mains for the defendant, was personally engaged in calking certain iron pipes which had been placed for that purpose upon blocks. The plaintiff, while helping him to raise the pipes, was injured by one of them falling from the blocks. *Held*, that the negligence, if any, of the foreman in not properly securing the pipes upon the blocks was the negligence of a fellow-servant of the plaintiff, for which the defendant is not liable. *Johnson v. Ashland Water Co.* 51

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10. The evidence (stated in the opinion) is *held* not to show a failure on the part of the defendant to employ a sufficient number of men or to furnish proper appliances to do the work safely. *Ibid.*

11. Where the dangers of an employment are obvious to any one of ordinary intelligence, the employer is under no legal obligation to warn an employee thereof. *Ibid.*

MEDICAL JURISPRUDENCE. See PHYSICIANS AND SURGEONS.

MINES AND MINING.

1. By a contract under seal C., M. & Co. agreed to excavate or run a "level" to drain certain mineral lands, and, in consideration thereof, W., the owner, agreed to render to them one eighth of all the mineral raised on said lands. It was expressly stipulated that the contract should be binding upon the heirs, executors, administrators, and assigns of both parties, and that the covenant of W. should run with the land; and, to secure to C., M. & Co. one eighth of the mineral raised, an undivided eighth of all the mineral in the lands was conveyed to them. *Held*, that the covenant of W. ran with the land. *Crawford v. Witherbee*, 419

2. The contract was silent as to the depth to which the level should be excavated, and as to who should keep it in repair. In an action by successors in title of C., M. & Co. against devisees of W. to recover the value of one eighth of the ore raised on the lands during a certain time, it appeared that though the level was somewhat out of repair, yet the ore was raised without trouble or increased expense by reason of water. *Held*, that the question whether or to what extent the plaintiffs were bound to keep the level in repair, was not raised. *Ibid.*

3. A notice, given by the defendants to the plaintiffs before the action was commenced, to repair the level in compliance with the original agreement, is an admission that the plaintiffs are the successors of C., M. & Co. in the title. *Ibid.*

MORTGAGES.

Of Land.

1. In an action by mortgagor against mortgagee for an accounting and to have the mortgage debt adjudged paid, a surety on the mortgage note who, to the knowledge of the mortgagor before the action was commenced, had been compelled to pay said note and had thereby become the owner of the mortgage debt, is a necessary party and is entitled to come in and defend without terms. *Hunt v. Rooney*, 258

2. The reversal of an order denying to such surety the right to become a party except upon terms which he refused to comply with, operates to vacate a judgment in favor of the plaintiff. *Ibid.*

Of Chattels. See CHATTEL MORTGAGES. DEBTOR AND CREDITOR. EVIDENCE, 10, 11. PARTNERSHIP, 1. VOLUNTARY ASSIGNMENT, 1.

MUNICIPAL CORPORATIONS. See COUNTIES. RAILROADS, 2, 4. TOWNS. WATERCOURSES, 1, 3.

NAVIGABLE RIVERS. See PUBLIC LANDS. WATERCOURSES.

NEGLIGENCE. See FRAUD. HIGHWAYS, 1, 9. MASTER AND SERVANT. RAILROADS, 7–28. TELEPHONE COMPANIES, 2.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

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NEW TRIAL.

1. In a case where the evidence was such that opposite conclusions might reasonably be drawn from it by different persons, the granting of a new trial, on the usual terms, upon the ground that the verdict was against the weight of evidence, is *held* not to have been an abuse of discretion. *Kittner v. M. & N. R. Co.* 1

2. An order denying a motion for a new trial on the ground of newly discovered evidence will not be reversed where such evidence is merely cumulative and might, with proper diligence, have been produced on the trial. *Wieting v. Millston,* 523

3. The denial of a motion for a new trial on the ground of newly discovered evidence will not be held an abuse of discretion where it does not appear that such evidence would probably produce a different result. *Williams v. Riches,* 569

4. To justify the reversal of an order granting a new trial on the ground that it was based upon a misapprehension of law, such misapprehension should appear in the order itself. *Warner v. Michelstetter,* 674

NOTICE.
Chattel mortgage filed, but lost. See CHATTEL MORTGAGES, 2.
Of time, etc., for examination of claims. See ESTATES OF DECEDENTS, 1.
Of defect in highway. See HIGHWAYS, 1.
Of injury from defect. See HIGHWAYS, 7, 8.
Of motion: Service, etc. See JURISDICTION, 1, 2.
Constructive notice is not "discovery" of fraud. See LIMITATION OF ACTIONS, 2.
Of dangers of employment. See MASTER AND SERVANT, 7, 11.
As admission of title. See MINES AND MINING, 3.
Of tax sale: Posting, etc. See TAX TITLES, 1.

NUISANCE. See WATERCOURSES.

OFFICES AND OFFICERS.
Judicial elections: Ballots. See ELECTIONS.
Contracts for less than statutory compensation. See CONTRACTS, 5.
County clerk. See PARTIES.
Sheriff. See COSTS, 2. DEBTOR AND CREDITOR.
Commissioners to review equalization. See TAXATION.
Town board. See HIGHWAYS, 1, 2, 7. TOWNS.
Town clerk. See CHATTEL MORTGAGES.
School officers. See COMMON SCHOOLS.

OFFSETTING JUDGMENTS. See JUDGMENT, 2.

OPINIONS. See EVIDENCE, 3, 5, 7, 9. RAILROADS, 12.

OPTIONS. See VENDOR, ETC. OF LAND, 1.

PARENT AND CHILD. See DAMAGES, 1, 6, 7. DEATH. SPECIFIC PERFORMANCE.

PARTIES.

See ACTION, 1. CONTRACTS, 1, 4. CORPORATIONS, 1, 6. EQUITY. INSURANCE, 5. JUDGMENT, 1. MORTGAGES. PARTNERSHIP, 3, 8.

1. In an action upon the official bond of a county clerk, the complaint alleged that he had received money for the redemption of tax certificates held by many different persons, and had converted the same to his own use. The answer, by way of abatement, alleged

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that the holders of such certificates were necessary parties, but did not name them. *Held*, that such holders were not necessary parties, and a motion to make the answer more definite and certain was, therefore, properly denied. *Door Co. v. Keogh*, 24

2. The complaint also alleged that the clerk had failed to deliver three several county orders to the respective payees therein named, but had drawn the money thereon and converted it to his own use. *Held*, that as such payees all stood in the same relation to the controversy, it was not necessary to plead separately the nonjoinder of each in abatement of the action. *Ibid.*

PARTNERSHIP.

See VOLUNTARY ASSIGNMENT, 1, 2.

1. A bank loaned money to one member of a firm and, to secure payment thereof and of certain moneys previously owing by the firm, took a note signed by the partners individually and a mortgage of firm property signed in the same way. The bank knew at the time that the firm was insolvent and that the money then loaned was to pay the individual debt of the partner to whom it was loaned. *Held*, that to the extent of the money so loaned the mortgage was void as against other creditors of the firm. *Cribb v. Morse*, 322

2. In an action upon contract the defendant alleged that the contract was made with the plaintiff and another person as partners. This allegation was not denied by affidavit, as required by sec. 4197, R. S. (which provides that if not so denied it shall be taken to be true), but the question of partnership was litigated on the trial without objection on the part of the defendant. *Held*, that this was a waiver on his part of the statutory presumption. *Stuckey v. Fritsche*, 329

3. Under sec. 2605, R. S., providing that actions must be brought in the name of the real party in interest, a partner to whom his copartner has assigned a partnership claim must sue thereon in his own name. *Ibid.*

4. The evidence in this case — showing, among other things, that one of the plaintiffs testified there had been no settlement in full of the claims in suit, and that the other plaintiff, his partner, who was clearly in the interest and to a considerable extent under the control of the defendant, testified that he had made such a settlement with the defendant and given a receipt in full (which was not produced), but was unable or unwilling to state what claims were allowed in such settlement on either side — is *held* to sustain a finding of the trial court that no settlement in full had been made. *Blewett v. Gaynor*, 378

5. The respective interests of the plaintiffs, as between themselves, in the claims in suit not being shown by the evidence, the fact that one of them testified that such claims had been settled does not limit the judgment to one half of the amount thereof. *Ibid.*

6. An agreement between the owner of standing timber and another, by which the latter is to cut the timber into cord-wood, and the owner is to market it, and the proceeds are to be divided equally between them, does not make them partners. *La Flex v. Burss*, 538

7. In an action in the names of all the other partners against the heirs of a deceased partner to recover the amount of the firm indebtedness, over and above its assets, chargeable to such deceased partner,

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an accounting was had and the amount of such indebtedness which each partner was bound to pay was determined. *Held*, that thereafter an action at law might be maintained by partners who had paid the whole of such indebtedness, to recover from the other surviving partners their proportionate share thereof. *Logan v. Trayser*, 579

8. The defendants in the second action having known that the first action was prosecuted to judgment in their names as plaintiffs, and never having objected thereto, are bound by such judgment, although such first action was commenced without their advice or consent. *Ibid.*

9. An adjudication in the first action that the plaintiffs therein had paid all the indebtedness of the firm, was not an adjudication that each had paid his proportionate share thereof, and therefore does not bar the second action. *Ibid.*

10. In the first action the plaintiffs were charged in the accounting with the value of some partnership property then in their possession, such value being applied to reduce the amount of the indebtedness of which each partner was adjudged bound to pay his proportionate share. *Held*, that the defendants in the second action were not entitled to further credit for their share of the value of that property. *Ibid.*

PAYMENTS, Application of. See SURETYSHIP, 3.

PENALTIES: Collection by civil action. See FORFEITURES.

PERJURY. See CRIMINAL LAW, 12, 13.

PERSONAL PROPERTY. See LOGS AND LUMBER, 1.

PERVERSE VERDICT. See DAMAGES, 9.

PHYSICIANS AND SURGEONS.

In an action against a surgeon to recover damages for the death of a person, alleged to have been caused by the defendant's failure to treat him properly, there can be no recovery unless it is proved sufficiently to bring conviction to a reasonable mind, without resorting to mere conjectures or uncertain and inconclusive inferences or bare probabilities, that the defendant's failure in his duty was the proximate cause of the death. *Gores v. Graff*, 174

PLACE OF TRIAL. See CRIMINAL LAW, 6–9. JURISDICTION, 3.

PLAT OF LANDS. See EVIDENCE, 8.

PLEADING.

See COMMON SCHOOLS. COSTS, 1. CRIMINAL LAW, 4, 11, 13. DEATH, 1. EQUITY, 1. INSURANCE, 4, 5. LOGS AND LUMBER, 2, 8. MARRIAGE, 1. PARTIES. RAILROADS, 1. SALE OF CHATTELS, 8. TOWNS, 1, 2. WATERCOURSES, 1, 2.

1. Only in case of a clear abuse of discretion will this court interfere with the allowance by the trial court of an amendment to the complaint to make it conform to the evidence. *McWhinne v. Martin*, 182

2. In an action to recover a balance alleged to be due upon a contract for logging, where the defendant admitted that the amount of work done and the agreed price therefor were as alleged, but pleaded payment in full, an allegation of the complaint that an accounting had

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been had and a balance found due the plaintiffs, which the defendant agreed to pay, is *held* to be merely an admission of part payment and not to make the action one solely upon an account stated. The burden was therefore upon the defendant to prove payment in full, and not upon the plaintiffs to prove the accounting. *Blewett v. Gaynor,* 378

3. A complaint alleged "that on March 10, 1883, and for many years theretofore, the defendants were, and they still are, a voluntary, unincorporated association of persons" known as the society of St. Patrick's church. The answer was that said defendants "admit that previous to the year 1883 they were members of and met at a certain church . . . known as 'St. Patrick's Church.'" *Held,* that this was an admission of the defendant's membership at and previous to the year 1883. *Sheehy v. Blake,* 394

POSSESSION of chattels: Presumptions. See REPLEVIN, 3, 4.

POSTING notices of tax sale. See TAX TITLES, 1.

PRACTICE.

See ACTION, 1, 2. APPEAL. APPEALABLE ORDER. CORPORATIONS, 6. COSTS. CRIMINAL LAW. DEBTOR AND CREDITOR. EQUITY. ESTATES OF DECEDENTS. EVIDENCE. EXECUTIONS. HIGHWAYS, 3, 7, 8. INSTRUCTIONS TO JURY. JUDGMENT. JURISDICTION. JURORS. JUSTICES' COURTS. LIBEL, 8, 9. MORTGAGES. NEW TRIAL. PARTIES. PARTNERSHIP, 2, 3, 5. PLEADING. RAILROADS, 1. TAXATION, 7. VERDICT.

1. Where several defenses, including a former adjudication, are pleaded, the trial should not be confined to the issue as to such former adjudication. *Coleman v. Hunt,* 263

2. A party who has testified in his own behalf cannot object to the reading of his cross-examination by counsel in the closing argument to the jury on the ground that it is not a fair statement of his testimony. His remedy is to insist that all his testimony be read. *Stuckey v. Fritsche,* 329

3. A motion to have a case reopened, after a referee has reported, for the receipt of further testimony is one peculiarly addressed to the discretion of the trial judge, and his determination is conclusive unless it clearly appears that injustice will be done thereby. *Blewett v. Gaynor,* 378

PRESUMPTIONS. See APPEAL, 1, 4. COMMON SCHOOLS. COSTS, 2. JURORS. LIBEL, 5. PARTNERSHIP, 2. REPLEVIN, 3, 4.

PRINCIPAL AND AGENT. See RELIGIOUS SOCIETIES. TAX TITLES, 4, 5. VENDOR, ETC. OF LAND, 1, 4.

PRIVILEGED COMMUNICATIONS. See LIBEL, 3.

PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See HIGHWAYS, 9. PHYSICIANS AND SURGEONS.

PUBLIC LANDS.

A grant from the government, without reservation, of lands on the bank of a navigable river, vests in the purchaser the title to any unsurveyed islands lying between the main land and the center of the stream. *Chandos v. Mack,* 578

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PUBLIC POLICY. See CONTRACTS, 5.

PUBLIC SCHOOLS. See COMMON SCHOOLS.

PUBLICATION.
Of libel. See LIBEL, 2, 3.
Of list of unredeemed lands. See CONTRACTS, 5.

PUNITORY DAMAGES. See DAMAGES, 5.

QUIA TIMET. See EQUITY.

RAILROADS.

Condemnation of Land.

1. Whether the railroad company should file an answer to a petition for the appointment of commissioners to appraise the damages for an alleged taking of land, and whether, in the absence of any answer, the burden is upon the petitioner to establish the facts alleged, not determined. *Trustees v. M. & L. W. R. Co.* 158

2. The owner of property on one side of a street is not entitled to compensation by reason of the building of a railroad track along the other side of the street, wholly beyond the center line thereof, where such track was legally built prior to the enactment of ch. 255, Laws of 1889; and, where the city makes no complaint, such owner cannot claim compensation under that statute on the ground that the track was not legally built because not located in the center of the street, as required by a city ordinance. *Ibid.*

3. A slight filling of gravel on the street, to restore it to its former usefulness and to enable vehicles more conveniently to pass over the track into an alley, does not entitle such owner to compensation. *Ibid.*

4. The erection and maintenance of gates or barriers in a street at a railroad crossing, pursuant to a municipal ordinance requiring the same for the safety of the public, is not such a taking of land as will entitle the owners of abutting lots to compensation. *Ibid.*

5. In order to restore to its former usefulness a street crossed by its track, the defendant railroad company lowered the grade of such street, digging and removing the earth in front of plaintiffs' lot. *Held*, that although no part of such lot was taken for the right of way of the railroad, the company must make full compensation for the injury to the lot, including the depreciation in value resulting from the operation of the railroad in proximity thereto. *Shealy v. C., M. & N. R. Co.* 653

Donation of land by county. See COUNTIES.

Carriers of Passengers.

6. Plaintiff, having a ticket over another road, got by mistake upon one of the defendant's trains which did not go to her destination. The conductor put her off at a flag station for both roads. The depot at such station was closed at the time, and a dwelling-house near by was also temporarily locked. The plaintiff and her two children were obliged to wait for a train several hours without shelter, and her exposure was followed by a severe illness. The testimony was conflicting as to whether she showed her ticket to the brakeman on entering the defendant's train, and also as to whether the conductor demanded payment of fare. *Held:*

(1) If she showed her ticket to the brakeman, the conductor was not justified in putting her off at the flag station unless that was a

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reasonably safe and convenient point from which she could most expeditiously reach a train on the proper road.

(2) If she did not show her ticket to the brakeman, and if the conductor demanded fare of her which she did not pay, he was justified, under sec. 1818, R. S., in putting her off at the flag station. If that station was not a "usual stopping place" it was at least "near a dwelling-house," and it is immaterial that the occupant of such house was temporarily absent and the house closed while the plaintiff was there.

(3) There being no evidence that the conductor acted in a reckless, wanton, or insulting manner, or that he was influenced by malice or any other improper motive, the plaintiff could not recover punitory damages. *Patry v. C., St. P., M. & O. R. Co.* 218

Killing of Live-Stock.

7. In an action against a railroad company for the wilful or grossly negligent killing of a mare which got upon the track in the night-time without the fault of the defendant, it appeared that the train which killed the mare was running from thirty to thirty-five miles an hour; that the engineer first saw some horses on or near the track, and blew the whistle, whereupon they went in every direction; that he continued to sound the whistle until he got by the horses and supposed the track was clear; that after going some distance further he suddenly saw the mare running and stumbling on the track about 150 feet ahead of the engine; that it was then too late, and he did not try, to do anything, but struck the mare while going at full speed; and that, though it was a bright moonlight night, the engineer could not, from behind the headlight, see the track more than 150 feet ahead. There was also evidence that the engineer kept on sounding the whistle until he had passed some distance beyond where he first saw the horses, and that the mare had been running rapidly for some distance on the track before she was struck. *Held*, that the evidence was insufficient to support a verdict for the plaintiff. *Jones v. C., M. & St. P. R. Co.* 585

Injuries to Persons by Negligence.

8. The plaintiff having been run over by defendant's engine at a street crossing, an instruction as to the degree of care to be exercised by an engineer on approaching such a crossing, to the effect that the mere fact that a traveler is approaching the track is not sufficient to require the engineer to give an alarm or stop his engine, especially where it is in broad daylight, the engine plainly visible, the engine bell ringing, and the traveler an adult in apparent possession of his senses and looking in the direction of the train; that in such a case the engineer would have the right to assume that the traveler would stop, but that he cannot rest on that assumption so long as to allow his engine to reach a point where it will become impossible for him to control his train or give warning in time to prevent injury to the traveler, supposing the traveler to continue in his course — is *held* sufficiently favorable to the defendant. *Heddles v. C. & N. W. R. Co.* 228

9. The engineer having testified that the engine was running only between four and six miles an hour, and that he did not recollect having stated, shortly after the accident, that they were obliged to run faster than six miles an hour to do the work required, evidence that he did so state was admissible for the purpose of discrediting his testimony. *Ibid.*

10. Evidence that there was no sign-board at the crossing, warning persons to look out for the cars, was admissible. *Ibid.*

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11. The whistle on the engine not having been blown, it was not an error prejudicial to the defendant to admit in evidence a city ordinance prohibiting the blowing of engine whistles within the city limits "except as a necessary signal or to prevent accidents." *Ibid.*

12. A witness who was in attendance upon the plaintiff for three or four weeks after he was injured was competent, though not an expert, to state whether he suffered greatly or not. *Ibid.*

13. Evidence as to plaintiff's mental condition before and after the injury was admissible. *Ibid.*

14. A ruling that a question is admissible is not a ruling as to the admissibility of a part of the answer which is not responsive thereto. *Ibid.*

15. A verdict for $30,000 had been set aside. On the second trial counsel for the plaintiff, in an argument to the court in the presence of the jury, referred to the former verdict, claiming that in view of additional facts shown the damages then awarded would not now be excessive. *Held*, that these remarks were not so outside of the case as to justify a reversal of the judgment, especially as the second verdict was for only $18,500. *Ibid.*

16. To run a train at an unlawful rate of speed within the limits of a city is negligence. *Piper v. C., M. & St. P. R. Co.* 247

17. When a traveler on a public street in a city approaches a railway crossing he may properly assume, if nothing appears to the contrary, that a train is moving at a lawful rate of speed; and if it was moving at an unlawful rate, that fact may be considered in determining the question of contributory negligence. *Ibid.*

18. In an action for injuries sustained at a railway crossing in a city, the testimony tended to show, among other things, that when between fifty and sixty feet from the crossing the plaintiff looked in the direction from which the defendant's train was coming, and did not see it, though he could have seen it had it then been within 900 feet of the crossing; that his attention was diverted by the conduct of his horses, so that he did not look again in that direction until he reached the track, when the train was so near that a collision could not be avoided; that the train was running thirty-six miles or more an hour, and that no warning was given as it approached the crossing; and that if the train had been 900 feet away when the plaintiff first looked, and had been running at the lawful rate of six miles an hour, he would have passed far beyond the crossing before the train reached it. *Held*, that it could not be said, as a matter of law, that the plaintiff was guilty of contributory negligence. *Ibid.*

19. Although the statute did not require the whistle to be blown at that place, if those in charge of the train saw the plaintiff approaching the crossing and believed that he was unaware of the train's approach, it was their duty to sound the whistle as well as to take every other reasonable precaution to prevent the collision. *Ibid.*

20. It was not error to charge that it was the peculiar province of the jury to decide whether the whistle was blown at the whistling post, or the engine bell rung before and while passing over the crossing, as well as the rate of speed at which the train approached the same. *Ibid.*

21. Plaintiff's intestate was last seen alive walking beside a switch track in defendant's yard, going eastward towards a street which crossed said yard from north to south. It was a cold and stormy day, and he had a shawl about his head and ears. His dead body was found on the switch track about fifteen feet east of a sidewalk which ran along the west side of said street. Blood was found on the east side

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of that sidewalk and thence along the track to the spot where the body was found. He had been struck and killed by cars which had passed him going westward and had then been pushed upon said switch track and negligently left to run eastward unattended. Upon the evidence, showing the foregoing facts among others, it is *held* that the jury might properly have found that the deceased, when struck by the cars, was on the sidewalk, where he had a right to be, and that he was not guilty of any contributory negligence in failing to see the cars as they approached him. *Phillips v. M. & N. R. Co.* 349

22. The plaintiff was struck and injured by defendants' locomotive on a sidewalk crossing in a thickly settled portion of a city. It was in the night-time and the locomotive had come down the street behind her, going in the same direction. The track curved sharply just before crossing the sidewalk, which was planked continuously on a level with the tops of the rails. The testimony tended to show, among other things, that the plaintiff was not familiar with the locality and did not know the precise position of the crossing; that trees and telegraph poles between the track and the sidewalk obscured, to some extent, her view of the track; and that, because of the curve, the light from the head-light did not fall directly upon her until the locomotive was very near the crossing. *Held* that, notwithstanding a special finding that if the plaintiff had looked before attempting to cross the track she could have seen the light from the head-light, it was still a question for the jury whether she was guilty of any contributory negligence. *Winchell v. Abbot,* 371

23. No weight can be given to a finding in the special verdict that the defendants' failure to have a light or a flagman at the crossing, to warn the plaintiff of the approaching locomotive, was negligence. The jury was not competent to determine that proposition. *Ibid.*

24. But, the defendants' negligence in failing to provide proper means for securing the safety of persons at the crossing being conclusively established, the court should base its judgment upon the existence of such negligence, although there is no valid finding to that effect in the special verdict. *Ibid.*

25. In an action to recover for personal injuries caused by plaintiff's horses being frightened by a locomotive and running away, a witness who owned the horses about a year before the accident was properly allowed to testify as to whether they were gentle or wild when he owned them. *Kalbus v. Abbot,* 621

26. The fact that the plaintiff was allowed to testify that no one had ever warned him about this team, is *held* not sufficient ground for a reversal of the judgment in his favor. *Ibid.*

27. An instruction that "the fact that this team may have once before run away, or was easily frightened, was not contributory negligence on the part of the plaintiff unless the jury find that a person of ordinary care and prudence would not drive such a team over this railroad crossing under all the circumstances in this case,"—is *held* sufficiently favorable to defendants. *Ibid.*

28. The evidence in this case—tending to show, among other things, that after a street in a city had been blocked for ten or fifteen minutes by defendants' train, and a number of teams, including the plaintiff's, had gathered, waiting to cross, the train was backed off the street, and the engine became hidden from the plaintiff by a building; that the defendants' flagman at once signaled to plaintiff to cross, but before he could pass the tracks the engine returned into the

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street, blowing off steam and making a great noise; and that plaintiff's horses were frightened thereby and ran away, causing the injuries complained of — is *held* to sustain a finding by the jury that defendants' servants were guilty of negligence. *Ibid.*

RATIFICATION. See RELIGIOUS SOCIETIES. TOWNS, 5.

REAL PROPERTY. See COUNTIES. EASEMENTS. EQUITY. EXECUTIONS. HIGHWAYS, 2–6. HUSBAND AND WIFE. INSURANCE, 2–6. JURISDICTION, 3. LIMITATION OF ACTIONS. LOGS AND LUMBER, 1, 5–7. MINES AND MINING. MORTGAGES. PUBLIC LANDS. RAILROADS, 1–5. SPECIFIC PERFORMANCE. TAX TITLES. VENDOR, ETC. OF LAND. WILLS, 4–7.

RECEIVERS. See CORPORATIONS, 4.

RECOGNIZANCE. See CRIMINAL LAW, 8.

RECORDING ACTS. See EXECUTIONS.

REDEMPTION. See TAX TITLES, 4, 5.

REFERENCE. See PRACTICE, 3.

REGISTRY LAWS. See EXECUTIONS.

RELIGIOUS SOCIETIES.

See PLEADING, 3.

The evidence in this case — tending to show, among other things, that the financial and secular affairs of an unincorporated religious society were managed by trustees and a secretary and treasurer elected from time to time by the congregation, together with the officiating priest; that moneys were advanced for the society from time to time by the priest, C., for the erection of a church building, and that he allowed much of his salary to remain in arrears; that the secretary kept regular books showing the accounts between the society and said priest, and from time to time these were balanced and the amount of the indebtedness to the priest publicly stated to the congregation assembled in the church; that finally, after said C. had been succeeded by another priest, a final settlement of said accounts was made by a member of the society as attorney for C., and by a committee consisting of a former secretary of the society, an attorney at law and trustee thereof, and the successor of C. in the priesthood, representing the society; and that the amount of the indebtedness to C. was then determined and the terms of payment fixed — is *held* to sustain findings by the jury that said committee was authorized by the members of the society to make such settlement, and that it was ratified and approved by them. Such members are therefore individually liable to pay the indebtedness thus found due to C. *Sheehy v. Blake,* 394

REPLEVIN.

See EVIDENCE, 10, 11.

1. In replevin by an administrator for a certain sum of money and certain municipal bonds claimed to have been sent by the decedent in a box by express to one of the defendants, evidence showing the denomination of the bank bills sent and the numbers and amounts of the bonds, is *held* sufficiently to identify and describe the property. *Murray v. Norwood,* 405

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2. A witness for the plaintiff having testified that a certain amount of money was put into the box and sent to one of the defendants, and the defendants having testified that they did not receive any money in the box, it was not error to charge the jury that the amount of money which was deposited in the box and sent should be determined from the testimony of the plaintiff's witness alone. *Ibid.*

3. It was not error to charge that if the decedent, shortly before his death, or at the time it was claimed the box was sent, had the money and bonds in his possession, then the presumption was that he was the owner of the same at the time of his death, and that the plaintiff was entitled to the possession thereof. *Ibid.*

4. Nor was it error to charge that if the defendants were in possession of the property at the time the box was received, the presumption was, unless the property was wrongfully disposed of, it was in their possession at the commencement of the action; and if they were in possession of the property at the time the box was received, but had wrongfully placed it in the possession of some one else, to conceal it or to prevent the plaintiff from recovering it, then they were liable the same as if they were in the actual possession of the property. *Ibid.*

RES ADJUDICATA. See PARTNERSHIP, 9.

RESCISSION of contract. See VENDOR, ETC. OF LAND, 2.

REVERSAL OF JUDGMENT. See JUDGMENT, *Reversal.*

RIGHT OF WAY. See EASEMENTS.

RIVERS. See PUBLIC LANDS. WATERCOURSES.

RULES OF COURT.
Circuit Court Rule XXIX (Annulment of marriage), 640, 641.
County Court Rule X, sec. 10 (Guardians' accounts), 666, 671-2.

SALE OF CHATTELS.

See EVIDENCE, 9-11.

1. The question being as to whether the defendant was the real purchaser of goods shipped to a third person, a charge to the jury that, unless the defendant promised the plaintiffs, before the goods were delivered, unconditionally, that he would pay for them, and the plaintiffs parted with their goods on the faith of such promise, there could be no recovery, is *held* to have been sufficient upon that point. *Hopkins v. Stefan,* 45

2. Though the defendant's original promise to pay for the goods was made on Sunday, he is liable therefor if he renewed the promise on a secular day and the goods were afterwards delivered on a secular day upon the faith of such renewed promise. *Ibid.*

3. It appearing by the bill of particulars furnished by the plaintiffs that certain goods charged therein had been paid for, there was no error in striking out such item, on the plaintiffs' motion. *Ibid.*

4. The order-books and ledgers of the vendors were admissible in evidence in connection with the testimony of the clerks who made the entries therein and swore to their correctness; and, where the sale and delivery of the goods was abundantly established by other evidence, an error, if any, in the charge to the jury as to the effect of such books as evidence, was immaterial. *Ibid.*

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5. In a contract for the sale of logs, which were to be cut and hauled to the railroad within a certain time, the vendor agreed to load them upon the cars as ordered by the vendees, and the title was to vest in the vendees as fast as they were loaded. There being no express provision on the subject, it is *held* that the cars were to be furnished by the vendees and within a reasonable time after the logs were ready to be loaded. *Boyington v. Sweeney,* 55

6. Whether a delay of more than two months in furnishing the cars was reasonable or not, was a question properly left to the jury. *Ibid.*

7. If, after the vendees were notified that the logs were ready to be loaded, they neglected for an unreasonable time to furnish the cars, and thereafter the logs were destroyed by fire, the loss should fall upon them, and the vendor may recover the contract price of the logs destroyed, as though they had been delivered, less the cost of loading them upon the cars. *Ibid.*

8. Such recovery may be had, in an action by the vendees for a failure to deliver the logs, upon a counterclaim setting forth the facts and claiming to recover as for a full performance of the contract. *Ibid.*

9. If, after the logs were ready to be loaded, the vendees fully accepted them and, for a valuable consideration, agreed to relieve the vendor from the duty of loading them and to do the loading themselves, the subsequent destruction of the logs was their loss. *Ibid.*

10. If, by the terms of the sale, the purchaser of a machine is not bound to take it, after a trial, unless he chooses, he may reject it whether it is capable of doing good work or not. *Warder, B. & G. Co. v. Whitish,* 430

11. Upon the sale of a bull the vendor gave to the vendee a writing which, after setting forth the pedigree of the bull, stated: "I have this day sold the above-named bull . . . to [the vendee]. I hereby certify the above pedigree to be true." *Held,* that as this writing evidenced the sale and contained an express warranty not implied by law, parol evidence was inadmissible to show a further express warranty against sterility. *McQuaid v. Ross,* 470

SALE OF LANDS. See MINES AND MINING. PUBLIC LANDS. TAX TITLES. VENDOR, ETC. OF LAND.

SCHOOL DISTRICTS. See COMMON SCHOOLS.

SELF-DEFENSE. See CRIMINAL LAW, 5.

SETOFF.

A bank cannot set off, against a deposit to the credit of an assignor for the benefit of creditors, a note held by it against him but not due at the time of the assignment. *Oatman v. Batavian Bank,* 501

SETTLEMENT. See PARTNERSHIP, 4, 5. RELIGIOUS SOCIETIES.

SHERIFF. See COSTS, 2. DEBTOR AND CREDITOR.

SPECIAL VERDICT. See HIGHWAYS, 3. MASTER AND SERVANT, 5–8. RAILROADS, 23, 24. VERDICT.

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SPECIFIC PERFORMANCE.

See VENDOR, ETC. OF LAND, 3.

A father, after the marriage of his son A., gave him the possession and use of a farm, with the understanding that if he worked it and conducted himself properly it should be devised to him upon the death of the father. After occupying the land for a number of years and having made improvements of the value of $100, A. died. The land was then worth about $4,000. An equal division of the father's estate at that time among his children would have given A. about $3,500. After A.'s death, the father placed another son, G., in possession of the farm, and thereafter, until his own death, used the income of $3,500 in support of A.'s widow and children, and by his will bequeathed that sum to said children, who, by their guardian, accepted the bequest. The farm was devised to G., who had made improvements thereon of the value of about $3,500. *Held*, that there was no agreement to convey the land to A. which could be enforced in favor of his widow or children. *Snyder v. Snyder*, 95

STATUTE OF FRAUDS. See EXECUTIONS, 2. VENDOR, ETC. OF LAND, 3.

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STAY OF EXECUTION. See JUDGMENT, 2.
STOCK AND STOCKHOLDERS. See CORPORATIONS.
SUNDAY. See SALE OF CHATTELS, 2.

SURETYSHIP.

See BILLS AND NOTES, 1. MORTGAGES. PARTNERSHIP, 7–10.

1. Each payment by a surety in excess of his proportion of the debt gives a right of action for contribution, and the statute of limitations begins to run from the date of each such payment. *Bushnell v. Bushnell*, 435
2. An action at law for contribution is limited to six years from the time when the cause of action accrued, although an equitable action might have been brought within ten years. *Ibid.*
3. Where the value of property and money received by a surety from the principal debtor was less than the amount of payments made by such surety in excess of his proportion of the debt, as to which payments an action for contribution was barred, it was proper to apply such property and money upon said payments and not upon a subsequent payment as to which the right of action for contribution was not barred. *Ibid.*
4. In an action by a surety for contribution only the legal rate of interest upon the amount recovered should be allowed, even though the debt paid by the plaintiff bore a higher rate. *Ibid.*

TAXATION.

See TAX TITLES. TOWNS, 6.

1. Where the decision of commissioners appointed to review the equalization of assessments does not operate to reduce the amount of taxes to be paid by the town applying for their appointment, it is "adverse" to such town, within the meaning of sec. 4, ch. 291, Laws of 1880, and renders it liable to reimburse the county for the expenses of the commission. *Outagamie Co. v. Greenville*, 165
2. An error of the commissioners, in increasing the aggregate valuation of property contrary to law, would not defeat their right to compensation. *Ibid.*
3. The valuations of the real and the personal property as fixed by the county board were placed in separate columns, and a third column purported to contain the aggregate of such valuations for each town and city. *Held*, that errors of computation in such third column did not affect the actual valuations contained in the other two; that where the aggregate of such valuations was not increased by the commissioners appointed to review the equalization, a mistake of the county clerk in computing the taxes to be raised by the several towns and cities on the basis of the erroneous total of the third column, even though it reduced the amount to be raised in the town which applied for the appointment of the commissioners, could not affect the liability of such town for the expenses of the commission. *Ibid.*
4. In the absence of fraud or collusion, and where there has been a substantial compliance with the statute, the allowance by the county board of the accounts of the commissioners for their services and expenses is binding upon the town which is chargeable therewith. *Ibid.*

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5. But if such accounts are not properly itemized as required by sec. 677, R. S., their allowance by the county board is not binding upon such town. *Ibid.*

6. An account for "seventy days' service as commissioner, $280," and one for "fifty days' service of livery for commissioners, at $4.50 — $225," it appearing that such services were performed between May 9 and August 8, 1888, are *held* to have been sufficiently itemized, although they did not give the date of each day's service. But an account for "hotel expenses and railroad fare, etc., $171.42" is *held* not sufficiently itemized. *Ibid.*

7. The commissioners, being empowered by sec. 2, ch. 212, Laws of 1882, to conduct their proceedings "after the usual manner of a judicial hearing," may, within reasonable limits, make a view of the real estate in the county, and will be entitled to their *per diem* and necessary expenses while so engaged. *Ibid.*

TAX TITLES.

See CONTRACTS, 5. HUSBAND AND WIFE, 1. LIMITATION OF ACTIONS, 1.

1. Failure of the proof of posting notices of a tax sale to show that one of such notices was posted in a conspicuous place in the county treasurer's office, invalidates a tax deed issued upon such sale. *Morrow v. Lander,* 77

2. In an action to set aside a tax deed for such defect, it was not error to refuse to require the plaintiff to pay into court the amount of taxes assessed upon the land *prior* to the sale in question. *Ibid.*

3. The limitation prescribed by sec. 3, ch. 309, Laws of 1880, does not apply to an action to set aside a tax deed on that ground. *Ibid.*

4. If an agent employed to collect rents and pay taxes on land, having rents in his hands sufficient to pay the taxes, allows the land to be sold therefor and purchases at the tax sale, it amounts to a redemption from the sale, and he thereby acquires no valid title as against his principal. *Fox v. Zimmermann,* 414

5. The result is the same if the agent purchases at the tax sale as agent for his wife and in her name, for in such case she is chargeable with notice of the fraud. *Ibid.*

TELEPHONE COMPANIES.

1. Under a statute allowing telephone lines to be constructed and maintained along a public highway provided they do not obstruct or incommode the public use of such highway, telephone poles erected from four to six feet from the fence in an almost perfectly level highway are not such obstructions as render the company liable for personal injuries caused by runaway horses colliding with one of such poles. *Roberts v. Wis. Telephone Co.* 589

2. The question whether the telephone company by placing its poles in the highway as stated, was negligent, or was guilty of a breach of legal duty, might properly be determined by the court on demurrer to a complaint setting forth the facts. *Ibid.*

TENDER of deed. See VENDOR, ETC. OF LAND.

THREATENING COMMUNICATIONS. See CRIMINAL LAW, 10.

TITLE to land: Action to quiet. See EQUITY.

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TOWNS.

See HIGHWAYS. TAXATION.

1. In an action upon town orders signed by the chairman of the town board, countersigned by the town clerk, and purporting on their face to have been issued for demands against the town, the complaint need not allege that the claims of the persons to whom the orders were issued were audited by the town board, or that the board authorized the clerk to issue the orders. *Brown v. Jacobs*, 29

2. Town orders payable "out of any moneys in the town fund not otherwise appropriated" are not drawn upon a particular fund, and in an action thereon it need not be alleged that there are moneys in the town funds out of which they could be paid. *Ibid.*

3. There being no law authorizing the establishment of a separate road fund, town orders purporting to be drawn upon such a fund are payable out of the general fund of the town. *Marvin v. Jacobs*, 31

4. A town board may provide protection against fire by the construction of reservoirs, etc., only when authorized so to do by a resolution adopted at an annual town meeting, as provided by ch. 292, Laws of 1883. *Dullanty v. Vaughn*, 38

5. An unauthorized contract for the construction of such reservoirs cannot be ratified by the subsequent adoption, at a *special* town meeting, of a non-retroactive resolution giving authority, or by the adoption and use of the reservoirs. *Ibid.*

6. To enforce the obligation of a town to raise by taxation its share of the amount required for the support of a joint free high school, the remedy is not by action to recover such share as a claim against the town, but by *mandamus* to compel the levy and collection of the tax. *Joint Free High School Dist. v. Green Grove*, 532

TRANSMISSION of papers, on change of venue. See CRIMINAL LAW, 8.

TRIAL, Place of. See CRIMINAL LAW, 6–9. JURISDICTION, 3.

TRUSTS AND TRUSTEES. See EXECUTIONS, 2. GUARDIAN AND WARD. TAX TITLES, 4, 5.

USAGE. See CRIMINAL LAW, 14. DAMAGES, 10. LOGS AND LUMBER, 8.

VENDOR AND PURCHASER OF LAND.

See LOGS AND LUMBER, 1. MINES AND MINING. PUBLIC LANDS.

1. A contract for the sale of land, upon which the purchasers paid $200 "as earnest money," provided that an abstract of title should be furnished without delay and a warranty deed delivered within ten days thereafter on receipt of the cash payment and security for deferred payments; and that "if the title is found to be good, and nevertheless not accepted by the purchasers (the deed being tendered) within the time and as herein named, said earnest money is forfeited as the consideration paid for this agreement, and the owner of said premises shall be considered to have fully performed on his part, and may declare the contract terminated. Time is made the essence of the agreement." *Held*, that the purchasers did not

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thereby merely secure an option to buy the land, but, if the title was good, were absolutely bound to accept the property and pay for it; and, though the vendor elected to waive a performance on their part and to retain the $200 and the property, a broker who had procured such purchasers for him was entitled to a commission on the sale. *Willes v. Smith*, 81

2. In an action for the breach of the covenants in a warranty deed it appeared that the grantor did not have actual possession of the premises before or at the time the deed was executed, that he had never delivered possession thereof to the grantee, and that the latter had never acquired possession under his deed. *Held*, that the burden of proof was upon the grantor to show that he was seised of an estate in fee at the time of the execution of the deed, and in the absence of such proof the grantee (who had tendered a reconveyance) was entitled to a rescission of the contract and to recover the purchase price paid, with interest from the date of the deed. *McLennan v. Prentice*, 124

3. Payment of any considerable part of the purchase price, and the vendee's entry into possession and making of improvements, constitute such a part performance of an oral contract for the sale of land as will take it out of the statute of frauds and justify the enforcement of specific performance. *McWhinne v. Martin*, 182

4. The defendant B., a tenant in common of land and authorized by his co-tenants to sell the same, employed brokers to negotiate a sale, authorizing them to get offers and report them to him. Afterwards he wrote to the brokers that he wished to sell, and would take $450 for the land. The brokers showed this letter to the plaintiff, who accepted the offer, paid $50 down and deposited the balance in a bank to await a conveyance, and went into possession of the land and made improvements thereon. The brokers notified B. that they had made this sale, but he neglected for more than two months either to affirm or disaffirm the contract, and afterwards sold and, with his co-tenants, conveyed the land to the defendant M., who had knowledge of all the facts. *Held*, that there was a contract to convey the land to the plaintiff, which was binding upon both defendants. *Ibid.*

5. The vendee in a land contract was to raise oats on one third of the land for five years, and to deliver the five crops to the vendor in full payment for the whole tract. He was to have immediate possession of the whole tract, and was to pay the taxes. The vendor refused to give him possession of the land, and wholly failed to perform the contract on his part. *Held*, that the measure of damages for such breach is the value of the land less the contract price, such price in this case being the necessary expenses of raising the five crops of oats and delivering the same to the vendor. The value of the use of the remaining two thirds of the land should not be added to the value of the land, to increase the damages; nor should the taxes to be paid by the vendee be included with the cost of raising the oats, to reduce the damages. *Muenchow v. Roberts*, 520

6. The vendor of land who had not the title thereto at the time specified in the contract for the conveyance, cannot defeat a recovery of the money paid on the contract by procuring title and tendering a conveyance after the commencement of the action. *Lutz v. Compton*, 584

VENUE. See CRIMINAL LAW, 6–9. JURISDICTION, 3.

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VERDICT.

See DAMAGES, 9. HIGHWAYS, 3. MASTER AND SERVANT, 5–8. RAILROADS, 23, 24.

1. A special verdict which does not determine all the material and controverted facts in issue, is defective, and if it is unaccompanied by a general verdict, such defect is not waived by a failure to object to the questions submitted or to request the submission of others. *Sherman v. Menominee L. Co.* 14

2. Where particular questions of fact are submitted to the jury, they should not be instructed as to what answers thereto would be consistent, and what inconsistent, with a general verdict in favor of one or the other party. *Ryan v. Rockford Ins. Co.* 611

3. The jury returned a general verdict for the plaintiff and an answer to one of three particular questions submitted. These were accepted and retained by the judge, who thereupon changed the form of one of the unanswered questions and, without giving any further instructions, sent the jury out again to answer those questions. The jury had previously been instructed that an affirmative answer to those questions would be consistent with the general verdict. They returned an affirmative answer to one of the questions and a verbal statement which, on consultation with the judge, was finally agreed upon as the proper answer to the other. These proceedings were had in the absence of defendant's attorney. *Held*, error. *Ibid.*

4. Separate parts of a verdict should not be determined and returned at different times. *Ibid.*

5. Where the questions submitted for a special verdict covered the whole case, it was not error to refuse to submit other questions, the answers to which would not have been conclusive either way. *Kalbus v. Abbot*, 621

VIEW. See TAXATION, 7.

VOLUNTARY ASSIGNMENT.

See SETOFF.

1. A chattel mortgage of a stock of goods was given by a firm to secure an indebtedness a part of which had a few days before been assigned to the mortgagee by another creditor. The mortgage was subject to a prior one given to another creditor who was in possession of the property. There was no collusion between the mortgagees, each of whom in taking security acted for himself alone. The second mortgage did not cover the individual property of the partners, and it did not appear that it covered all of the firm property. *Held*, that it was not an assignment for the benefit of creditors within the meaning of sec. 1694, R. S. *Cribb v. Hibbard, S., B. & Co.* 199

2. Nor did an assignment of the ledger accounts of the firm to the second mortgagee as further security for the debt, whether considered by itself or in connection with the mortgage, bring the transaction within said section. *Ibid.*

3. A voluntary assignment does not vest title in the assignee as against creditors until the officer to whom the bond of the assignee is delivered has indorsed his approval thereon. *Shakman v. Schlueter.* 402

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WAIVER.
Of right to appeal. See APPEAL, 6.
By wife of provision for her. See HUSBAND AND WIFE, 3.
Of right to have jury charged. See INSTRUCTIONS TO JURY, 3.
Of mistake in charge to jury. See INSTRUCTIONS TO JURY, 5. LIBEL, 9.
Of tort. See LOGS AND LUMBER, 2.
Of presumption from allegation of partnership not properly denied. See PARTNERSHIP, 2.
Of defect in verdict. See VERDICT, 1.
Of right to support under will. See WILLS, 7.

WARRANTY. See SALE OF CHATTELS, 11.

WATERCOURSES.

See PUBLIC LANDS.

1. In an action to restrain the driving of piles in the bed of a river in a city, and the erection thereon of a building fronting on a bridge, a complaint alleging that the flow of water in the river has already been obstructed by bridges and other structures, that the erection of the building in question will lead others to erect similar buildings fronting on the bridges and supported in like manner, until the whole space over said river on both sides of the bridges is occupied thereby, and that by reason thereof the flow of water in the river will be further permanently obstructed, and the interests of the city and its inhabitants greatly prejudiced and injured by obstruction to the circulation of air, and in respect to the dangers of fire and flood and to the public health, and as respects equality of taxation and assessments and the benefits thereof, is *held* not to state a cause of action in favor of the city. *Janesville v. Carpenter*, 288

2. Nor does the complaint state a cause of action in favor of a mill-owner using the water-power furnished by the river, by alleging that the erection of the building by the defendant will cause the waters of the river to set back "to some extent" at the place where the water used to operate the mill is discharged again into the river, where no injury by reason thereof is alleged. *Ibid.*

3. The fact that the erection of a building is prohibited by a municipal ordinance is not ground for an injunction against it. *Ibid.*

4. Ch. 423, Laws of 1887 (providing that "it shall be unlawful and presumptively injurious . . . to persons and property to drive piles, build piers, cribs, or other structures . . . in Rock river within the limits of the county of Rock, and the doing of any such act shall be enjoined at the suit of any resident tax-payer without proof that any injury . . . has been or will be caused by reason of such act," and that "the doing of any such act shall also be enjoined at the suit of any owner or lessee of the right to use water of said river to operate any mill . . . within said county, without proof of any further fact than that such act will cause the water of said river to rise or set back to some extent at the place where the water used to operate said mill . . . is discharged into said river"), is unconstitutional and void:

(1) It deprives riparian owners of their property without compensation or due process of law, and without giving them any remedy, in violation of art. V, XIV, Amendments, Const. of U. S., and secs. 9, 13, art. I, Const. of Wis.

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(2) It is a usurpation of the judicial power by the legislature, in violation of sec. 2, art. VII, Const. of Wis.

(3) It is discriminating and class legislation, in violation of the spirit of the constitution and contrary to public justice. *Ibid.*

WAYS. See EASEMENTS.

WILLS.

See EVIDENCE, 6. SPECIFIC PERFORMANCE.

1. A will provided that "whereas my brother G. . . . is now indebted individually to the estate of my husband, S., deceased, I direct that such individual indebtedness be paid for him out of my estate (so that he may be wholly released from the same) so far as any such indebtedness remains outstanding at my decease." G., while doing business for his brother W., had borrowed money from the husband of the testatrix, giving notes therefor signed in the name of W. by G. as agent, and a portion of said notes remained unpaid. The testatrix had been accustomed to speak of the indebtedness upon said notes as the indebtedness of G., and it was that indebtedness to which she referred in her will. *Held* that, although G. was not legally liable to pay such indebtedness, it was the intention of the testatrix that it should be paid out of her estate. TAYLOR, J., dissents. *Scott v. Neeves,* 305

2. Parol evidence that the testatrix always regarded and spoke of such indebtedness as the indebtedness of G., was admissible to show that it was the indebtedness referred to in the will. *Ibid.*

3. In the action by the executor for a construction of the will in such case, the circuit court properly directed that the taxable costs and disbursements of all parties be paid out of the estate, and that the county court make such allowance to the respective parties out of the estate for counsel fees as might be just. *Ibid.*

4. A devise of a farm to the testator's son, "conditioned said son shall support and maintain my daughter Alice out of said property . . . during her natural life," does not require the daughter to live upon the farm in order to entitle her to such support. *Dickson v. Field,* 439

5. Such condition does not require the son to pay a cash annuity to the daughter, but to deliver to her, upon the farm, specific articles necessary to her maintenance. *Ibid.*

6. No formal demand was necessary to charge the son with such obligation. His failure to inform the daughter of his readiness to furnish such support puts him in default and renders him liable to pay a cash commutation for past support from the time she became entitled to the same, but does not entitle her to a cash annuity for life. *Ibid.*

7. The daughter being married when the devisee came into possession of the farm, her subsequent receipt of maintenance from her husband was a waiver of her right to look to the devisee therefor; but his obligation revived upon her husband's death. *Ibid.*

WORDS AND PHRASES.

Adjournment, in statute. See JUSTICES' COURTS, 1.

Adverse, in statute. See TAXATION, 1.

Any county court, in statute. See ESTATES OF DECEDENTS, 3.

Assignment for benefit of creditors. See VOLUNTARY ASSIGNMENT, 1, 2.

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Ballot, in constitution. See ELECTIONS.
Discovery of facts, in statute. See LIMITATION OF ACTIONS, 2.
Dwelling-house, in statute. See RAILROADS, 6 (2).
Facts showing, etc., in statute. See CRIMINAL LAW, 12.
Filed. See CHATTEL MORTGAGES, 1. CRIMINAL LAW, 6.
Fine, in statute. See FORFEITURES, 1.
Given (notice to officer), in statute. See HIGHWAYS, 7.
Indebtedness, in will. See WILLS, 1, 2.
Items of account, in statute. See TAXATION, 6.
Specially declared by *law*, in statute. See FORFEITURES, 2.
Loss of two entire feet, in accident policy. See INSURANCE, 1.
Misdemeanor, in statute. See FORFEITURES.
Obstruct or incommode public use of highway, in statute. See TELEPHONE COMPANIES, 1.
Obstruction, in statute. See HIGHWAYS, 6.
On or near, in deed. See EASEMENTS, 1.
Support *out of* a farm, in will. See WILLS, 4, 5.
Printing on back of ballot, in statute. See ELECTIONS.
Special or private law, in constitution. See CORPORATIONS, 3.
Taking of land. See RAILROADS, 2–5.
Then and there, in information. See CRIMINAL LAW, 11.
Usual manner of a judicial hearing, in statute. See TAXATION, 7.

WRIT OF ERROR. See CRIMINAL LAW, 1, 2.

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